81-5152

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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980
No. _____

OMAR TAYLOR
Petitioner

v.

STATE OF ALABAMA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA AND ALABAMA COURT OF CRIMINAL APPEALS

OMAR TAYLOR
Petitioner

ROBERT M. BENO
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529 S. Perry Street
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THE OPINIONS OF THE COURTS HEREIN ARE APPENDIXED AS FOLLOWS:

(A) OPINION OF THE COURT OF CRIMINAL APPEALS OF ALABAMA

(B) OPINION OF THE SUPREME COURT OF ALABAMA

JURISDICTION

The jurisdiction of this Court being invoked under Title 28 U.S.C. §1257(3)

CONSTITUTIONAL PROVISIONS

1. THE FOURTH AMENDMENT PROVIDES:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable search and seizure, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized."

QUESTIONS

1. Whether or not fingerprints taken from Petitioner following a warrantless arrest based on less than probable cause are admissible into evidence in light of the Petitioner's right under the Fourth Amendment of the Constitution against illegal search and seizure.

2. Whether or not a confession taken from Petitioner following a warrantless arrest based on less than probable cause and after six hours of intermittant questioning subsequent to the arrest is admissible into evidence in light of the Petitioner's rights under the Fourth Amendment of the Constitution against illegal search and seizure.

STATEMENT OF THE CASE

1. Your Petitioner was the subject of a warrantless arrest in reference to a robbery occurring December 2, 1978. The arrest was based on certain statements made by an inmate awaiting trial in an unrelated, unsolved crime. Your Petitioner was arrested, fingerprinted, and questioned. The fingerprints matched those found at the crime scene on objects held by one of the robbers. Your Petitioner was confronted with the fingerprints, and questioning continued until some six hours after the initial arrest a confession was obtained.

2. At all stages of the proceeding, your Petitioner objected to and moved for the exclusion and suppression of the aforementioned fingerprints and confession. All such motions being denied.

3. On May 27, 1980, The Court of Criminal Appeals for the State of Alabama reversed the trial Court. See opinion attached as Appendix A. Application for rehearing denied.

4. On August 27, 1980, The Court Supreme Court of Alabama granted Certiorari.

5. On February 27, 1981, The Supreme Court of Alabama reversed and denied application for rehearing April 10, 1981.

6. The ruling of The Supreme Court was affirmed by The Court of Criminal Appeals on April 21, 1981, and on May 11, 1981 a 60-day stay was granted for preparation of Writ of Certiorari.

7. Appointed counsel misread the order and allowed the time granted for preparation of the Writ to pass, but because of the nature and fact that the time period in a criminal case is not jurisdictional, it is hoped that the Court will consider the same regardless of appointed counsel's error. It is to be noted that the case before the Court is the first criminal case appealed by counsel and it is hoped that his impropriety will not be held against your Petitioner.

REASONS FOR GRANTING WRIT

1. It being understood initially that your Petitioner was arrested without a warrant on the statement of an accused robber and rapist in no way implicated in the present case at the time of his questioning. The State has argued successfully that the identification of the Petitioner by fingerprints after the initial arrest and leading to the subsequent confession are sufficient to attenuate any taint suggested in a recent decision, Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824(1979).

The initial issue and the one argued herein is whether those fingerprints could be legally used in creating probable cause for the arrest herein. Petitioner would submit a contrary view. Indeed, those prints only enhance the flagrancy of the Government's impropriety herein. Your Petitioner strongly urges this Court to take cognizance of the ruling in Mississippi v. Davis, 394 U.S. 721, 22 L.Ed2d 676, 89 S.Ct 1394(1969). A reading of the same would indicate that fingerprints as those taken herein are in direct violation of the Petitioner's Fourth Amendment rights as guaranteed under the United States Constitution. There, the Court suggested that only under, " narrowly defined circumstances", shall one's constitutional rights be compromised. In the present case, the police made no attempt to come within those "narrowly defined circumstances." One case of note illustrating the possibility of the "narrowly defined circumstances," as described in Mississippi v. Davis, is In Re The Fingering of M.B., 125 N.J.Super 115, 309 A.2d 3 (1973). There appears to be no case absent statute to the contrary permitting the police to use carte blanche in their intrusion upon the rights of individuals. U.S. v. Jennings, 468 F.2d 111(9th Cir. 1972) does much to fortify Petitioner's position that fingerprints taken from Defendant after arrest in less than probable cause are inadmissible.

The Courts hearing and reviewing this case have constantly permitted the fingerprints into evidence on one theory or another, but assuming the prints were illegally obtained, Silverthorne Lumber Co. v.

United States, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319(1920), would protect their excluded status throught the trial.

2. The confession herein and the facts and circumstances leading to the same are strikingly similar to a case recently before the Court. Specifically Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed. 824(1979).

It would be surplusage to go into a detailed argument in reference to the law as applied to the facts as your Petitioner would incorporate by reference the whole of the opinion supplied by the Court of Criminal Appeals for the State of Alabama, the Honorable Judge Harris presiding, as grounds for granting the Writ requested. (See Appendix A).

CONCLUSION

For the foregoing reasons, a Writ of Certiorari shall issue to review the judgment of the Supreme Court of Alabama and Alabama Court of Criminal Appeals.

Respectfully Submitted,

Robert M. Beno
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529 S. Perry Street
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MAY 27 1980

Appendix A

THE STATE OF ALABAMA --- JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1979-80

3 Div. 118

Omar Taylor

v.

State

Appeal from Montgomery Circuit Court

HARRIS, PRESIDING JUDGE

Appellant was convicted of robbery and the trial court sentenced him to thirty years in the penitentiary. At arraignment, in the presence of his counsel, he interposed a plea of not guilty and not guilty by reason of insanity. Appellant did not testify in the case in chief and he offered no evidence under his special plea of not guilty by reason of insanity.

Appellant filed a pretrial motion seeking to have his confession suppressed and his arrest declared illegal. A full blown hearing was held on this motion and much testimony was taken. At the conclusion of the hearing the motion to suppress was overruled and denied.

On December 2, 1978, three black males entered Moseley's Grocery Store located at the intersection of West Jeff Davis Street and Cleveland Avenue at approximately 7:00 p.m. They had previously entered into an agreement to rob the store. There had been a number of robberies in this area of the city of Montgomery in recent weeks and the police officers had initiated an intensive manhunt in an effort to apprehend the robbers. They interviewed a number of suspects in the course of which they learned that appellant might be involved in the robbery of Moseley's Grocery Store. According to one of the investigating officers the information that appellant might have been involved in the robbery came from a jail inmate who was a suspect in the same robbery. Charles Martin was in custody charged with rape and robbery in an unrelated case.

At the suppression hearing Police Officer R. D. Mobley testified that he had numerous conversations with Martin in the course of which Martin told Mobley he had information that appellant was involved in the robbery of the Moseley Grocery Store. Mobley stated that Martin, "didn't tell me how he got it. I don't know how he got it. He did not go into any details or who told him or when or where he obtained the information, but only that he was involved in a robbery . . . He said that he had heard that Omar Taylor was involved in the robbery of Moseley's Grocery. What part he took, he doesn't know."

The trial court was concerned about the credibility and reliability of Mobley's informant and Officer Mobley was questioned along this line and replied, "I do not know him that well. I know I arrested him. He has never given me any information before, so I do not know."

From the record:

> "Q. So, what you are saying, then, based on what he told you, he had no way of knowing other than what he had heard from someone else whether or not the defendant (Taylor) may or may not have been involved in this robbery? In other words, he had to believe his source in order to give you the information he had.
>
> "A. Yes, sir, as far as I know. I don't know how he knew. I don't know if he was a party to the robbery his self.(sic) He was a suspect to me at that time . . . He did not go into any details or who told him or when or where he obtained the information, but only that he was involved in a robbery.
>
> "Q. Was there anything other than your personal suspicion and based on your conversation with him previously, was there any reason or foundation for which you could believe the defendant (sic)? Were there any - - did he give you any places where you may be able to find the money or find any of the weapons or any other element which might give credibility to his statements?
>
> "A. No, sir. He didn't say anything else other than the fact that he knew that Omar Taylor was involved in the robbery. He didn't know where the money, gun or anything else was."

Officer Mobley did not arrest appellant. He referred the information which he had received from inmate Charles Martin to two other officers assigned to the Robbery and Homicide Division of the Montgomery Police Department. These two officers arrested appellant without a warrant on January 4, 1979, at approximately 3:00 p.m., as he emerged from a pool hall on Holt Street. The arrest was based solely on the information furnished them by Officer Mobley following his interview with Charles Martin as set forth above. Upon arresting appellant they informed him who they were and told him that he was being arrested in connection with the robbery that occurred at Moseley's Grocery and Meat Market. They searched him for weapons prior to putting him in the patrol car and transported him to the station house and surrendered him to other detectives for questioning. After appellant was placed in the patrol car one of the officers, from memory, recited to him his constitutional rights. One of the arresting

officers, Sergeant Ed Alford, testified that the arrest was made on information furnished by other investigators in the Robbery Division who had interviewed Charles Martin. Acting on this information appellant was arrested without a warrant as the officer felt that it was necessary to pick him up and check him out. He was asked if he felt the information was sufficient to arrest appellant and he replied, "Well, I did not know because I had never seen him." He was asked if there was any basis on which the credibility of Charles Martin could be established and he answered, "I did not attempt to establish any credibility on him." Officer Alford further stated that the arrestee was not asked if he understood the rights given him and he replied, "I did not ask him anything concerning his rights. I just advised him of his rights."

Mr. and Mrs. John Moseley were in the store on the night of December 2, 1978, when the robbery occurred. Mr. Moseley was at the cash register checking out customers and Mrs. Moseley was in the office near the back of the store when she observed two black men enter the store. One of the robbers entered the office and pulled a pistol on Mrs. Moseley and said, "This is a stick up. Give me all the money in the safe." She told him there was no money in the safe. He again demanded the money and she told him that the safe was old and was not in use any more. He grabbed her by the collar of her coat and forced her from the office and told her to go to the back of the store. As she was leaving the office she looked in the direction of the check-out register and saw her husband and an employee with their hands in the air and another black man pointing a pistol at them. Shortly thereafter she saw two black men exit the store.

Mr. Moseley testified that just before closing time a black man, approximately five feet, five inches tall, came to the check-out counter and placed on the counter a two pound bag of Domino sugar and a package of Zeigler hot dogs. He asked for some lighter flints and when Mr. Moseley turned back around the man was standing there pointing a pistol at him. Mr. Moseley was

ordered to open the cash register and give him all the money. Mr. Moseley flipped open the register and the bandit got the money himself." The amount was $600.00. The bandit then asked for his wallet and Mr. Moseley told him he did not have a wallet. With the pistol still pointed at Mr. Moseley the man again ordered him to produce his wallet. Mr. Moseley then reached in his back pocket and got his wallet which contained eight or nine hundred dollars in large bills and handed the wallet to the man. The man immediately ran from the store. The packages of sugar and hot dogs remained on the counter where the robber had placed them. Mr. Moseley then called the Police Department to report the robbery.

Mr. and Mrs. Moseley were unable to identify either one of the three black men engaged in the robbery at the lineup or in court. The officers were careful in picking up the packages of sugar and hot dogs to process them for latent fingerprints. The fingerprints turned out to be those of appellant and there is no contention to the contrary. The interrogating officers informed appellant that his fingerprints were found on the bags of sugar and hot dogs and he subsequently signed a waiver of rights form and executed a written confession. The proper predicates were laid and the waiver of counsel form as well as the signed confession were admitted into evidence.

Appellant does not question the voluntariness of his confession because it was shown without dispute that he was given the Miranda rights and warnings. It was also shown without dispute that no promises, threats, coercion, rewards or hopes thereof were made or held out to him to induce him to make and sign the confessions admitted into evidence. On the other hand appellant contends that he was illegally arrested without probable cause and without an arrest warrant and was involuntarily transported to the station house for interrogation which led to his confession.

He urges this court to reverse his conviction on authority of the opinion of the Supreme Court of the United States in Dunaway v. New York, ____ U. S. ____, 99 S. Ct. 2248 (1979). A careful reading of the opinion in Dunaway, supra, convinces us that it is controlling and this case must be reversed and remanded. We are left with no other choice.

The facts in this case leading to the arrest and detention of appellant and the facts leading to the arrest and detention of Dunaway are basically indistinguishable. In both cases the information was supplied by a jail inmate awaiting trial on unrelated unsolved crimes but the information supplied was insufficient to obtain an arrest warrant. Nevertheless, other detectives were ordered to pick up the suspects and bring them in for questioning. In each case the suspects were picked up and transported to the station house and placed in an interrogation room where each was questioned by officers after being given the warnings required by Miranda v. Arizona, 384 U. S. 436, 86 S. Ct. 1602. Both waived counsel and eventually made statements that incriminated them in the crimes. Both filed motions to suppress the statements (and in Dunaway the sketches of the crime scene - and in appellant's case the fingerprints he left on the packages of sugar and hot dogs) which were denied and both were convicted.

In Dunaway, supra, the court held:

> "The central importance of the probable cause requirement to the protection of a citizen's privacy afforded by the Fourth Amendment's guarantees cannot be compromised in this fashion. 'The requirement of probable cause has roots that are deep in our history.' . . . Hostility to seizures based on mere suspicion was a prime motivation for the adoption of the Fourth Amendment, and decisions immediately after its adoption affirmed that 'common rumor or report, suspicion, or even "strong reason to suspect" was not adequate to support a warrant for arrest.' The familiar threshold standard of probable cause for Fourth Amendment seizures reflects the benefit of extensive experience accommodating the factors relevant to the 'reasonableness' requirement of the Fourth Amendment, and provides the relative simplicity and clarity necessary to the implementation of a workable rule."

The court relied on some quotes from Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254 and Davis v. Mississippi, 394 U.S. 721, 89 S.Ct. 1394, and went on to say:

> "These passages from Davis and Brown reflect the conclusion that detention for custodial interrogation - regardless of its label - intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest. We accordingly hold that the Rochester police violated the Fourth and Fourteenth Amendments when, without probable cause, they seized petitioner and transported him to the police station for interrogation."

But there is more:

> "There remains the question whether the connection between this unconstitutional police conduct and the incriminating statements and sketches obtained during petitioner's illegal detention was nevertheless sufficiently attenuated to permit the use at trial of the statements and sketches. See Wong Sun v. United States, 371 U.S 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); Nardone v. United States, 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed.307 (1939); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920).
>
> "The New York courts have consistently held, and petitioner does not contest, that proper Miranda warnings were given and that his statements were 'voluntary' for purposes of the Fifth Amendment. But Brown v. Illinois, supra, settled that '[t]he exclusionary rule, . . . when utilized to effectuate the Fourth Amendment, serves interests and policies that are distinct from those it serves under the Fifth,' 422 U.S., at 601, 95 S.Ct., at 2260, and held therefore that 'Miranda warnings, and the exclusion of a confession made without them, do not alone sufficiently deter a Fourth Amendment violation.' Ibid.
>
> "'If Miranda warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted. . . . . Arrests made without warrant or without probable cause, for questioning or "investigation," would be encouraged by the knowledge that evidence derived therefrom could well be made admissible at trial by the simple expedient of giving Miranda warnings.' Id., at 602, 95 S.Ct., at 2261.
>
> "Consequently, although a confession after proper Miranda warnings may be found 'voluntary' for purposes of the Fifth Amendment, this type of 'voluntariness' is merely a 'threshold requirement' for Fourth Amendment analysis, 422 U.S., at 604, 95 S.Ct., at 2262. Indeed, if the Fifth Amendment has been violated, the Fourth Amendment issue would not have to be reached.

"Beyond this threshold requirement, Brown articulated a test designed to vindicate the 'distinct policies and interests of the Fourth Amendment.' Id., at 602, 95 S.Ct., at 2261. Following Wong Sun, the Court eschewed any per se or 'but for' rule, and identified the relevant inquiry as 'whether Brown's statements were obtained by exploitation of the illegality of his arrest,' id., at 600, 95 S.Ct., at 2260; see Wong Sun v. United States, 371 U.S. 471, 488, 83 S.Ct. 407, 9 L.Ed. 441 (1963). Brown's focus on 'the causal connection between the illegality and the confession,' 422 U.S., at 603, 95 S.Ct. at 2261, reflected the two policies behind the use of the exclusionary rule to effectuate the Fourth Amendment. When there is a close causal connection between the illegal seizure and the confession, not only is exclusion of the evidence more likely to deter similar police misconduct in the future, but use of the evidence is more likely to compromise the integrity of the courts.

"Brown identified several factors to be considered 'in determining whether the confession is obtained by exploitation of an illegal arrest[:] [t]he temporal proximity of the arrest and the confession, the presence of intervening circumstances, . . . and, particularly, the purpose and flagrancy of the official misconduct . . . And the burden of showing admissibility rests, of course, on the prosecution.' Id., at 603 - 604, 95 S.Ct., at 2261 - 62. Examining the case before it, the Court readily concluded that the State had failed to sustain its burden of showing the confession was admissible. In the 'less than two hours' that elapsed between the arrest and the confession 'there was no intervening event of significance whatsoever.' Ibid. Furthermore, the arrest without probable cause had a 'quality of purposefulness' in that it was an 'expedition for evidence' admittedly undertaken 'in the hope that something might turn up.' Id., at 605, 95 S.Ct., at 2262.

"The situation in this case is virtually a replica of the situation in Brown. Petitioner was also admittedly seized without probable cause in the hope that something might turn up, and confessed without any intervening event of significance. Nevertheless, three members of the Appellate Division purported to distinguish Brown on the ground that the police did not threaten or abuse petitioner (presumably putting aside his illegal seizure and detention) and that the police conduct was 'highly protective of defendant's Fifth and Sixth Amendment rights.' 61 A.D.2d, at 303, 402 N.Y.S.2d, at 493. This betrays a lingering confusion between 'voluntariness' for purposes of the Fifth Amendment and the 'causal connection' test established in Brown. Satisfying the Fifth Amendment is only the 'threshold' condition of the Fourth Amendment analysis required by Brown. No intervening events broke the connection between petitioner's illegal detention and his confession. To admit petitioner's confession in such a case would allow

'law enforcement officers to violate the Fourth Amendment with impunity, safe in the knowledge that they could wash their hands in the 'procedural safeguards' of the Fifth.'"

If the situation in Dunaway is virtually a replica of the situation in Brown, as noted by the Supreme Court, then the situation in the instant case is a replica of both Dunaway and Brown.

Section 200.08 of McElroy's Alabama Evidence, Third Edition, Gamble, reads as follows:

"It has been said that the irrefutable rule in this state is that even if an individual is illegally detained, such detention in itself does not render a confession, obtained during such detention, involuntary and inadmissible. This holds true whether the accused was arrested without probable cause, without a warrant or whether he was detained beyond the time by which he should have been taken before a committing magistrate."

Eleven cases from this court and the Supreme Court of Alabama are cited in footnotes under the above quotation. Doubtless there are many more such cases since this Third Edition was published in 1977. For the Bench and Bar to rely on such cases in the future will be extremely dangerous in the light of Dunaway v. New York, supra.

We are loath to reverse a case where the guilt of the accused is so clear and convincing and the guilt drips from the fingers of both hands, but our path is lighted in Dunaway and we are bound to follow this path.

The judgment of conviction is reversed and remanded on authority of Dunaway, supra.

REVERSED AND REMANDED.

All the Judges concur, except DeCarlo, J ., who dissents with opinion.

DeCarlo, J., dissents.

The United States Supreme Court in Dunaway v. New York, supra, reiterated the test laid down in Brown v. Illinois, supra, which articulates several factors that should be considered in determining the question; "[W]hether the connection between this unconstitutional police conduct and the incriminating statements and sketches obtained during petitioner's illegal detention was nevertheless sufficiently attenuated to permit the use at trial of the statements and sketches." Those factors are: (1) the temporal proximity of the arrest and the confession; (2) the presence of intervening circumstance; (3) and particulary, the purpose and flagrancy of the official misconduct.

The situation in the case involving the appellant, Omar Taylor, is distinguishable for that in the case of Dunaway v. New York, supra, because, in Dunaway, the accused made a statement within two hours after interrogation in the absence of an intervening circumstance which would have lessened the connection between his illegal detention and confession. In Dunaway, no "intervening circumstance" was present from the time the officers received the inmate's hearsay information, to the time Dunaway rendered incriminating statements and sketches.

In the case involving Omar Taylor, the officers, prior to receiving any information from the inmate, did have in their possession fingerprints taken from the bag of sugar and the hotdogs present at the time of the robbery. Further, at the time the officers picked up Taylor, they had no other information from which an investigation could be commenced, other than the inmate's allegation. The officers could not, at that time, determine the authenticity of the inmate's statement concerning the appellant, Taylor, without a fingerprint comparison. Under these circumstances,

it was reasonable for these officers to take Taylor into custody and to determine whether or not he was, in fact, the robber.

As the opinion reflects, prior to making any statement, Taylor was told by the interrogating officers that his fingerprints were found on the bag of sugar and on the bag of hotdogs, and it was after he had learned this information that he signed a waiver of rights form and executed a confession.

It was reasonable for the officers to investigate the information they had received because they were able to verify that information by comparison of fingerprints. The officers in Dunaway did not have an "intervening circumstance," fingerprint evidence for comparison, which lessened the connection between the alleged misconduct by the police and the confession of the defendant.

Therefore, in my judgment based on the foregoing facts, it can not be said that the officers in the present case were engaged in an "expedition for evidence." There existed in the case before us an intervening circumstance, that is, the fingerprint evidence. This "intervening circumstance" sufficiently attenuated any alleged unconstitutional conduct by the police so that the appellant's inculpatory statements were admissible.

For the foregoing reasons, I respectfully dissent.

Appendix B

THE STATE OF ALABAMA - - - - - - JUDICIAL DEPARTMENT

THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1980-81

Ex parte: State of Alabama, ex rel.
Attorney General

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS

(Re: Omar Taylor

79-732 v.

State of Alabama)

TORBERT, CHIEF JUSTICE.

We granted certiorari to review the decision of the Court of Criminal Appeals in Omar Taylor v. State, [MS. May 27, 1980] _____ So. 2d _____ (Ala. Crim. App. 1980), which reversed

the trial court decision. The principal issue presented for our consideration is whether the trial court erred in admitting the fingerprints and confession of the defendant, Omar Taylor. We hold that the evidence was properly admitted, and we reverse the decision of the Court of Criminal Appeals.

At approximately 7:00 p.m. on December 2, 1978, two males entered and robbed Moseley's Grocery Store at the intersection of West Jeff Davis Street and Cleveland Avenue. There had been a number of robberies in this area of Montgomery in recent weeks, and the police initiated an intensive manhunt in an effort to apprehend the culprits. A number of suspects were interviewed, and during the course of the interviews it was learned that Appellant might be involved in the robbery of Moseley's Grocery Store. According to one of the investigating officers, the information linking Appellant to the robbery came from a jail inmate, Charles Martin, who was himself a suspect in the same robbery. Martin was in custody, charged with rape and robbery in an unrelated case.

At a supression hearing, Police Officer R. D. Mobley testified that during numerous conversations with Martin, he told the officer he had information that Appellant was involved in the robbery of Moseley's Grocery Store. Mobley stated: "[Martin] didn't tell me how he got it. I don't know how he got it. ... He did not go into any details or who told him or when or where he obtained the information, but only that he was involved in a robbery. ... He said that he had heard that Omar Taylor [Appellant] was involved in the robbery of Moseley's Grocery. What part he took, he doesn't know."

Officer Mobley did not arrest Appellant. He referred the information which he had received from Martin to two other officers assigned to the Robbery-Homicide Division of the Montgomery Police Department, and these two officers arrested Appellant without a warrant on January 4, 1979. The arrest

was based on the information furnished them by Officer Mobley following his interview with Martin.

Upon arresting Appellant, the officers informed him who they were and told him that he was being arrested in connection with the robbery of Moseley's Grocery. After Appellant was placed in the patrol car, one of the officers recited to him his constitutional rights, and, upon arriving at the station house, Appellant was surrendered to other detectives for questioning.

Sergeant Ed Alford, one of the arresting officers, testified that the arrest was made on information furnished by another investigator in the Robbery-Homicide Division who had interviewed informant Martin. Based on this information, Appellant was arrested without a warrant, as the officer felt it necessary to pick him up and check him out. When asked if he felt his information was sufficient to arrest Appellant, he replied, "Well, I did not know because I had never seen him." Asked if there was any basis on which the credibility of Martin could be established, he answered, "I did not attempt to establish any credibility on him."

Mr. and Mrs. John Moseley were in their store on the night of December 2, 1978, when the robbery occurred. Mr. Moseley was at the cash register checking out customers and Mrs. Moseley was in the office near the back of the store when she observed two men come in. One of the men entered the office, pulled a pistol on Mrs. Moseley and said, "This is a stick up. Give me all the money in the safe." When she told him there was no money in the safe, he repeated the demand, whereupon she told him that the safe was old and was not in use. He grabbed her by her collar, forced her from the office, and told her to go to the back of the store. As she was leaving the office, she glanced in the direction of the check-out register and saw her

husband and an employee with their hands in the air and another man pointing a pistol at them. Shortly thereafter, she saw two men exit the store.

Mr. Moseley testified that just before closing time a man, approximately five feet, five inches tall, came to the checkout counter with a two-pound bag of Domino sugar and a package of Zeigler hot dogs. He then asked for some lighter flints. Mr. Moseley turned away to get the flints, and when he turned back around, the man pointed a pistol at him and ordered him to open the cash register. Mr. Moseley flipped open the register, from which the bandit took $600.00. The bandit then demanded his wallet. Mr. Moseley told him he did not have a wallet. When the man again ordered him to produce his wallet, Mr. Moseley then reached in his back pocket and got his wallet which contained eight or nine hundred dollars. He handed the wallet to the robber. The man immediately ran from the store, but left the packages of sugar and hot dogs on the counter. Mr. Moseley then called the police.

Mr. and Mrs. Moseley were unable to identify either of the men engaged in the robbery, either at a lineup or in court. Fingerprints on the sugar and weiners turned out to be those of Appellant. This fact was undisputed. The interrogating officers informed Appellant that his fingerprints were found on the bags of sugar and hot dogs. Subsequently, he signed a waiver of rights form and executed a written confession. The form and signed confession were later admitted into evidence.

Appellant does not question the voluntariness of his confession, as it was shown to have been given in compliance with Miranda. Additionally, no promises, threats, coercion, rewards or hopes thereof were made or held out to Appellant to induce him to make and sign the confession. Appellant contends, however, that he was illegally arrested without probable cause and without an arrest warrant, and was involuntarily transported to the station

house for interrogation which thereafter led to his confession.

The United States Supreme Court, in Brown v. Illinois, 422 U.S. 590 (1975), held that the question of whether a confession has been purged of the taint of an illegal arrest under Wong Sun v. United States, 371 U.S. 471 (1963), "must be answered on the facts of each case." 422 U.S. at 603. We are of the opinion that the facts in the case before us fall somewhere between those surrounding the confession in Wong Sun, where the Court held that the connection between Wong Sun's unlawful arrest and his statement "had become so attenuated as to dissipate the taint," 371 U.S. at 491, quoting Nardone v. United States, 308 U.S. 338, 341 (1939), and those in Dunaway v. New York, 442 U.S. 200 (1979), Brown v. Illinois, 422 U.S. 590 (1975), and Davis v. Mississippi, 394 U.S. 721 (1969), where the Court held that the confessions were tainted by the unlawful arrests. We must therefore determine on which side of the line separating admissible confessions from inadmissible ones the confession of Omar Taylor falls.

In Dunaway, the petitioner was arrested without probable cause in hopes that something would "turn up." 442 U.S. at 218. Less than an hour after he reached the police station, after being informed of his Miranda rights, he waived counsel and made the first of two statements and drew sketches that eventually incriminated him. 442 U.S. at 203. Between the time of Dunaway's arrest and that of his confession, "no intervening event of significance whatsoever" took place. 442 U.S. at 218.

Brown contained facts similar to those in Dunaway. Petitioner Brown was arrested without probable cause and made a statement shortly thereafter. The State of Illinois argued that the Miranda warnings were sufficient to attenuate the taint of the illegal arrest. The Court held that "[t]he Miranda warnings

are an important factor ... in determining whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factor to be considered." 422 U.S. at 603. Three additional factors were then set out by the Court to aid in determining whether the taint of an illegal arrest has been attenuated. They are: "[1] [t]he temporal proximity of the arrest and the confession, [2] the presence of intervening circumstances, and ... [3] the purpose and flagrancy of the official misconduct." Id. at 603-04 (citations omitted).

In Davis, the police in Meridian, Mississippi, without warrants, picked up 24 Negro youths over a period of 10 days and took them to police headquarters, where they were questioned briefly, fingerprinted, and then released without being charged. 394 U.S. at 722. Davis was subsequently arrested, without a warrant and without probable cause, and fingerprinted again. The second set of fingerprints, along with the fingerprints of 23 others, was sent to the FBI for comparison with prints taken from the scene of the crime. Id. The FBI matched Davis's prints to those of the perpetrator of the crime, and he was indicted. Id. at 723. The Court held that the fingerprints should be suppressed as the fruit of an illegal arrest. Id. at 728.

The Court held in Wong Sun, however, that where the defendant was lawfully arraigned and released on his own recognizance, and several days later voluntarily returned to the police station and made a statement, the taint had been attenuated. 371 U.S. at 491. On the other hand, statements made by Toy, another defendant in the case, at the time he was illegally arrested, and contraband seized during his arrest, were suppressible, since the statement did not result from "an intervening independent act of free will." Id. at 486.

While there admittedly has not been the same degree of attenuation here as in Wong Sun, neither is the statement as closely connected to the illegal arrest as in Dunaway, Brown, and Davis. Taylor had been under arrest for more than six hours when he made his statement. During that time he had been allowed to converse privately with his girlfriend and a male companion. He had been given his Miranda rights on three separate occasions. Additionally, subsequent to Taylor's arrest but prior to his confession, an arrest warrant was filed based on a comparison between his fingerprints and those found at the scene of the crime. In Johnson v. Louisiana, 406 U.S. 356 (1972), the Supreme Court held that where, prior to a lineup, the defendant was brought before a committing magistrate who advised him of his rights and set bail, the line-up was "sufficiently distinguishable to be purged of the primary taint." Id. at 365. Since a similar finding of probable cause separated the arrest and confession of Omar Taylor, it would seem that the taint has been purged here as it was in Johnson.

The exclusionary rule is especially harsh in situations such as this, where the motion to suppress involves a confession that is admittedly voluntary and where Miranda rights were given, not just once, but three times. The development of the rule reveals that it is a "judicially created means of effectuating the rights secured by the Fourth Amendment," Stone v. Powell, 428 U.S. 465, 482 (1976), rather than a constitutionally required sanction. It is not coextensive with the fourth amendment. Wolf v. Colorado, 338 U.S. 25, 29 (1949).

The roots of the rule can be found in Boyd v. United States, 116 U.S. 616 (1886). In that case the Court held that the federal government could not subpoena incriminating documents from criminal defendants. 116 U.S. at 638. The Court stated:

> Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other.

Id. at 630.

Twenty-eight years later, in Weeks v. United States, 232 U.S. 383 (1914), the Supreme Court made a definitive ruling that evidence seized by federal agents in violation of the fourth amendment was inadmissible in federal court. If evidence may be seized illegally and placed into evidence, the Court held, the fourth amendment "might as well be stricken from the Constitution." Id. at 393. At that time, however, the fourth amendment was not thought to be applicable to the states. Id. at 398.

Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920), went one step further than Weeks and Boyd. In Silverthorne, the Court held not only that evidence illegally seized must be excluded in federal court, but also that a prosecutor may not admit copies of the evidence made while it was unlawfully in his possession, nor may knowledge gained from the unlawfully seized evidence be the basis of a search warrant. Id. at 392. The evidence, however, did not become "sacred and inaccessible," but could be obtained "[i]f knowledge of [it] is gained from an independent source." Id. The Court stated that "[t]he essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." Id.

The Court held for the first time, in Wolf v. Colorado, 338 U.S. 25 (1949), that the fourth amendment applies to the states. There the Court said that "[t]he security of one's privacy against arbitrary intrusion by the police ... is basic to a

free society." Id. at 27. The Court further stated that the fourth amendment is "implicit in the concept of ordered liberty," and therefore is "enforceable against the States through the Due Process Clause." Id. at 27-28. The Court declined, however, to apply the exclusionary rule to the states, holding that "the ways of enforcing such a basic right raise questions of a different order," Id. at 28, and that "it is not for this Court to condemn as falling below the minimum standards assured by the Due Process Clause a State's reliance upon other methods which, if consistently enforced, would be equally effective." Id. at 31.

The Wolf holding was reinforced in Irvine v. California, 347 U.S. 128 (1954), but the Court indicated there that violation of an individual's fourth amendment rights by state officials might constitute a crime under federal statutory law. Id. at 137. Mr. Justice Jackson, writing for a plurality, directed the Clerk of the Supreme Court to "forward a copy of the record in this case, together with a copy of this opinion, for attention of the Attorney General of the United States." Id. at 138. However, two of the four Justices making up the plurality did not join in this directive. Id.

In Rea v. United States, 350 U.S. 214 (1956), an injunction was sought against a federal agent who proposed to testify in state court as to evidence gained through an illegal search and seizure. Id. at 216. The Court directed that the injunction be granted, basing its ruling on its "supervisory powers over federal law enforcement agencies." Id. at 217. The exclusionary rule, however, was still not made applicable to the states.

The so-called "silver platter doctrine" was overruled in Elkins v. United States, 364 U.S. 206 (1960). Although federal agents could not use evidence they themselves had seized unlawfully, evidence given to them by state officials could be admitted into federal court, regardless of how it had been

obtained. The evidence was thus handed to federal agents on a "silver platter." The exclusionary rule was still not applied to the states, but the Court did hold that the exclusionary rule was the "only effectively available way" to deter law enforcement officials from violating the fourth amendment. Id. at 217.

The exclusionary rule was finally applied to the states the next year, in Mapp v. Ohio, 367 U.S. 643 (1961). There the Court held that it was "clos[ing] the only courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of that basic right, reserved to all persons as a specific guarantee against that very same unlawful conduct." Id. at 654-55. The Court found that in so holding it ended the practice of federal agents "step[ping] across the street to the State's attorney with their unconstitutionally seized evidence." Id. at 658. The Court cited Irvine for the proposition that "[t]he obvious futility of relegating the Fourth Amendment to the protection of other remedies has ... been recognized by this Court since Wolf." Id. at 652-53.

The exclusionary rule has been highly criticized, both from within and without the United States Supreme Court. The justification for the rule is generally stated to be deterrence. Stone v. Powell, 428 U.S. 465, 486 (1976). Early cases also set out the preservation of "judicial integrity" as a justification for the rule, but this theory has been largely abandoned. Id. at 485. See, United States v. Peltier, 422 U.S. 531 (1975). The exclusionary rule is more or less unique to the United States among common law countries. Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 415 (1971)(Burger, C.J., dissenting). See, Kuruma v. The Queen, [1955] A.C. 197. See generally "The Exclusionary Rule under Foreign Law," 52 J. Crim. L.C. & P.S. 271 (1961). Laymen generally view the exclusionary

rule as a "technicality" that releases known criminals into society. See Wilkey, "The Exclusionary Rule: Why Suppress Valid Evidence?" 62 Judicature 214, 223 (1978). Evidence suppressed under the fourth amendment is not inherently unreliable, as are involuntary confessions, suppressed under the fifth amendment, and unduly suggestive line-ups, suppressed under the fifth and sixth amendments. See, Oaks, "Studying the Exclusionary Rule in Search and Seizure," 37 U. Of Chi. L. Rev. 665, 737-38 (1970). Additionally, the Court has consistently ruled that a criminal defendant may be forcibly abducted from another state or country and brought into a jurisdiction to stand trial. Frisbie v. Collins, 342 U.S. 519 (1952). Also see Oaks, supra, at 669. By refusing to bring out the whole truth, critics have charged, the courts allow the truth to be completely distorted. "Undeniable facts, of the greatest importance, are forever barred...." Wilkey, supra, at 222.

One of the more compelling criticisms leveled against the rule is that it does not accomplish the stated objective, i.e., deterrence. In 1960, when some states were still operating without the exclusionary rule, the United States Supreme Court stated in Elkins v. United States, 364 U.S. 206 (1960), that "[e]mpirical statistics are not available to show that the inhabitants of states which follow the exclusionary rule suffer less from lawless searches and seizures than do those of states which admit evidence unlawfully obtained." Id. at 218. See also, Irvine v. California, 347 U.S. 128, 136 (1954), where the Court said, "There is no reliable evidence known to us that inhabitants of those states which exclude the evidence suffer less from lawless searches and seizures than those of states that admit it." Chief Justice Burger further developed

this idea in his dissenting opinion in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971) (Burger, C.J., dissenting). There he stated that the effect of the exclusionary rule on police conduct is lessened by the long time lapse between the original police action and the final judicial evaluation. The Chief Justice surmised that "[g]iven a policeman's pressing responsibilities, it would be suprising if he ever becomes aware of the final result after such a delay." 403 U.S. at 417. Additionally, Burger continued, "[T]he exclusionary rule's deterrent impact is diluted by the fact that there are large areas of police activity that do not result in criminal prosecutions." 403 U.S. at 417-18. There are several motivations that prompt arrests and searches and seizures by police other than criminal prosecution. These include

> [1] arrest or confiscation as a punitive sanction (common in gambling and liquor law violations), [2] arrest for the purpose of controlling prostitutes and transvestites, [3] arrest of an intoxicated person for his own safety, [4] search for the purpose of recovering stolen property, [5] arrest and search and seizure for the purpose of "keeping the lid on" in a high crime area or of satisfying public outcry for visible enforcement, [6] search for the purpose of removing weapons or contraband such as narcotics from circulation, and [7] search for weapons that might be used against the searching officer.

Oaks, "Studying the Exclusionary Rule in Search and Seizure," 37 U. of Chi. L. Rev. 665, 721-22 (1970). This multiplicity of goals for an arrest or a search and seizure is in sharp contrast to the limited number of reasons for line-ups and confessions, two other types of commonly excluded evidence. The predominant incentive for the latter two is to obtain evidence for use in court. Oaks, supra, at 722. If the evidence is not to be used in court, the possibility of exclusion is a hollow threat.

Even worse than the lack of deterrence, however, is the conduct that the rule does promote among police officers. In a study conducted by Dallin Oaks pursuant to a grant from the National Institute of Law Enforcement and Criminal Justice of the United States Department of Justice, Professor Oaks concluded that "some experienced [police] officers will 'twist' the facts in order to prevent suppression of evidence and release of persons whom they know to be guilty." Oaks, "Studying the Exclusionary Rule in Search and Seizure," 37 U. of Chi. L. Rev. 665, 739-40 (1970). Oaks further stated that subsequent to Mapp, "the police were fabricating testimony in order to comply with arrest formalities and circumvent the exclusionary rule." Id. at 708.

A further criticism of the rule is that it fails to "provide effective and meaningful compensation to those citizens, particularly innocent victims of illegal searches and seizures." Wilkey, "The Exclusionary Rule: Why Suppress Valid Evidence?" 62 Judicature 214, 228 (1978). The "compensation" provided for the victims of an illegal arrest or search and seizure is irrational in that "the guilty are overrewarded by a commutation of all penalties for crimes they did commit and the innocent are never compensated for the injuries they suffered." Wilkey, supra, at 228. The policeman who engages in the unlawful conduct is rarely, if ever, subject to any type of personal sanction. See, Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 416 (1971) (Burger, C.J., dissenting); Oaks, "Studying the Exclusionary Rule in Search and Seizure," 37 U. of Chi. L. Rev. 665, 724 (1970). The immediate sanction that is triggered by the exclusionary rule is against the prosecutor, whose case against a criminal is either weakened or destroyed. The prosecutor, however, is not an official of the police department.

The exclusionary rule is well tailored to deter the prosecutor from illegal conduct. However, he is not the guilty party in an unlawful arrest or search and seizure, and he rarely, if ever, has control over those who are, the police. See 403 U.S. at 416, Oaks, supra, at 726.

Furthermore, the exclusionary rule "fails to discriminate between the degrees of culpability of the officer or the degree of harm to the victim of the illegal search and seizure." Wilkey, "The Exclusionary Rule: Why Suppress Valid Evidence?" 62 Judicature 214, 225-26 (1978). Regardless of whether there is a mere technical violation, such as a defective warrant, or a gross violation of the fourth amendment, such as was seen in Mapp v. Ohio, 367 U.S. 643 (1961), the penalty is the same; the evidence is excluded. Wilkey, supra, at 226. In contrast, the judicial system customarily applies different standards to crimes that vary as to seriousness, such as in granting bail and in imposing sentence. Id. Additionally, even though "[i]nadvertent errors of judgment that do not work any grave injustice will inevitably occur under the pressure of police work," Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 418 (1971)(Burger, C.J., dissenting), these errors are, from a law enforcement standpoint, impossible to correct. Once the unlawful search or arrest is made, it is often difficult or impossible to convict the defendant involved, irrespective of his guilt. E. Griswold, Search and Seizure: A Dilemma of the Supreme Court 57 (1975). The courts make decisions as to the legality of arrests and searches and seizures "after full briefs and oral arguments, ... with full deliberation within the court, and often with numerous and vigorous dissents." E. Griswold, supra, at 52. The same decisions must be made by police officers "usually in a moment or two, with no opportunity for deliberation and

in the stress of immediate action." E. Griswold, supra, at 52.

The tenor of the criticism of the exclusionary rule was summed up by Wigmore when he stated that "the two effects of the exclusionary rule are to produce a troublesome grist for the courts and to return rascals to the practice of their nefarious trades." 8 J. Wigmore, Evidence in Trials at Common Law (rev. by J. McNaughton) § 2184a at 52 (1961). More important than the outside criticism, however, is the criticism of the exclusionary rule by members of the United States Supreme Court. In the past five years, the members of the Court have, in their opinions, evidenced more and more restraint in the application of the rule.

This "backing off" process began as early as 1954. In that year, the Court decided the case of Walder v. United States, 347 U.S. 62 (1954). There it held that if a defendant asserts on direct examination that he has never seen or possessed evidence seized unlawfully (there, narcotics), the evidence may be admitted solely for purposes of impeachment. Id. at 64. The Court stated:

> It is one thing to say that the government cannot make an affirmative use of the evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. Such an extension of the Weeks doctrine would be a perversion of the Fourth Amendment.

Id. at 65.

In Linkletter v. Walker, 381 U.S. 618 (1965), the Court ruled that its decision in Mapp v. Ohio, 367 U.S. 643 (1961), was not retroactive. In support of this conclusion, the Court stated that "the fairness of the trial is not under attack," 381 U.S. at 639, and that "the ruptured privacy of

the victims' homes and effects cannot be restored." 381 U.S. at 637.

The Court recognized in Terry v. Ohio, 392 U.S. 1 (1968), that the exclusionary rule is an imperfect tool for controlling police misconduct. There it stated:

> Regardless of how effective the [exclusionary] rule may be where obtaining convictions is an important objective of the police, it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forgo successful prosecution in the interest of serving some other goal.

Id. at 14. Terry carved out an exception to the warrant requirement in the area of "stop and frisk," lowering the requirement in that situation from probable cause to "whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." Id. at 27.

Desist v. United States, 394 U.S. 244 (1969), continued the rationale of Terry when it refused to apply retroactively Katz v. United States, 389 U.S. 347 (1967), the case which defined the limits of fourth amendment protection in terms of reasonable expectation of privacy, 389 U.S. at 353. The Court stated that "we simply decline to extend the court-made exclusionary rule to cases in which its deterrent purpose would not be served." 394 U.S. at 254 n.24.

Chief Justice Burger's vigorous dissent in Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388 (1971), has previously been noted, but even the majority opinion in that case was not completely favorable to the exclusionary rule. The majority found it necessary to recognize a cause of action for damages by citizens subjected to unlawful searches and seizures against the officials who violated their fourth amendment rights. Id. at 397.

Michigan v. Tucker, 417 U.S. 433 (1974), was a case involving violation of fifth amendment rights. It was, however, highly critical of the exclusionary rule. The Court there stated:

> Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policemen investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the vagaries of human nature would make such an expectation unrealistic. Before we penalize police error, therefore, we must consider whether the sanction serves a valid and useful purpose.

Id. at 446. The Court went on to say that "[w]here the official action was pursued in complete good faith ... the deterrence rationale loses much of its force." Id. at 447.

The Court made an even stronger statement in United States v. Peltier, 422 U.S. 531 (1975). There it stated that "evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." Id. at 542. Peltier declined to apply retroactively the rule of Almeida - Sanchez v. United States, 413 U.S. 266 (1973), which requires a warrant for border searches made elsewhere than at established border crossings.

The Court found in United States v. Ceccolini, 435 U.S. 268 (1978), that the taint of an unlawful search and seizure is much easier to attenuate where the evidence discovered was the identity of a live witness who later testified at trial. "The penalties visited upon the Government, and in turn upon the public, because its officers have violated the law must bear some relation to the purposes which the law is to serve," the Court stated. Id. at 279. Mr. Justice Rehnquist, writing for the Court, concluded that "the degree

of free will exercised by the witness is not irrelevant in determining the extent to which the exclusionary rule will be advanced by its application." Id. at 276.

Even more compelling than the language cited from the foregoing cases, however, are the numerous exceptions to the exclusionary rule the Court has created over the years. Although "a search conducted without a warrant issued upon probable cause is per se unreasonable," Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973), and "the burden is on those seeking [an] exemption [from the requirement] to show the need for it," Chimel v. California, 395 U.S. 752, 762 (1969), quoting United States v. Jeffers, 342 U.S. 48, 51 (1951), the Court has recognized that "[t]here are exceptional circumstances in which, on balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate's warrant for search may be dispensed with." Johnson v. United States, 333 U.S. 10, 14-15 (1948). These exceptions have multiplied over the years, and have seriously limited the scope of the warrant requirement and, a priori, the exclusionary rule.

The first exception to be recognized by the Supreme Court was the automobile exception. It held in 1925, in the case of Carroll v. United States, 267 U.S. 132 (1925), that a warrant to search an automobile could be dispensed with since "[b]efore a warrant could be secured the automobile would be beyond the reach of the officer." Id. at 146. The Court went on to say, however, that the officer carrying out the search must possess "a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction." Id. at 149. In other words, there must be probable cause for the search.

This mandate has been required in all cases setting out exceptions to the warrant requirement. The automobile exception was further developed in Chambers v. Maroney, 399 U.S. 42 (1970). There the Court again focused on the mobility of the car, and held further that a car could be searched without a warrant even after the suspect-driver of the automobile had been arrested and the car had been driven to the police station. However, the Court limited the exception in the case of stationary cars in Coolidge v. New Hampshire, 403 U.S. 443 (1971), stating that "[t]he word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." 403 U.S. at 461-62. More recently, the Court has held that police may make a warrantless search of an automobile at the station house for the purpose of making an inventory of its contents. South Dakota v. Opperman, 428 U.S. 364 (1976). The justification for this rule is threefold. First, the police have the responsibility of protecting the owner's property while it remains in police custody. Second, the police may conduct an inventory to protect themselves against claims or disputes over lost or stolen property. Third, an inventory will protect police and the public from potential hazards, such as bombs or other explosive devices. 428 U.S. at 369. An inventory may be made not only of cars driven by persons who have been arrested, but also of cars abandoned or towed away for parking violations. 428 U.S. at 368.

A second exception promulgated by the Court was the "evanescent evidence" exception. This exception applies to evidence that is either of short duration or highly destructible. Schmerber v. California, 384 U.S. 757 (1966), dealt with the suppression of a blood-test for the purpose of showing the percentage of alcohol in the defendant's blood. The Court recognized that "the percentage of alcohol in the blood begins

to diminish shortly after drinking stops, as the body functions to eliminate it from the system." Id. at 770. Because of the short duration of the existence of this type of evidence, and because of the length of time necessary to procure a warrant, the Court held that "the attempt to secure evidence of blood-alcohol content in this case was an appropriate incident to petitioner's arrest." Id. at 771. In Cupp v. Murphy, 412 U.S. 291 (1973), the Court extended this doctrine to searches and seizures of evanescent evidence that were not incident to arrests. There the police took fingernail scrapings from a suspect who was present at the police station but who was not under arrest. The validation of the search was premised on "the existence of probable cause, the very limited intrusion undertaken incident to the station house detention, and the ready restructibility of the evidence." 412 U.S. at 296.

The Court set forth the so-called "hot pursuit" exception in Warden v. Hayden, 387 U.S. 294 (1967). There the Court upheld the search of a residence for "a suspected felon, armed, within the house into which he had run only minutes before the police arrived." Id. at 299. The scope of the search, the Court held, is "as broad as may reasonably be necessary to prevent the dangers that the suspect at large in the house may resist or escape." Id. The Court justified its holding on the ground that "[t]he Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others." Id. at 298-99.

A search warrant is not required when the party in control of the searched premises gives his consent to the search, Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973). The consent, however, must be "freely and voluntarily given," and the prosecution has the burden of proving voluntariness, Bumper v. North Carolina, 391 U.S. 543, 548 (1968). Consent

given after a claim of authority to search by a police officer is not valid, since he has in effect told the occupant of the house that he has no right to resist the search. "Where there is coercion there cannot be consent." 391 U.S. at 550. However, "knowledge of a right to refuse is not a prerequisite of a voluntary consent." 412 U.S. at 234. Although consent may not be coerced, either explicitly or implicitly, "[v]oluntariness is a question of fact to be determined from all the circumstances." 412 U.S. at 248-49. While knowledge of the right to refuse consent to a search, or lack thereof, is a factor to be considered in assessing voluntariness, it is not determinative. 412 U.S. at 249.

The permissible limits of a search incident to arrest were set out by the Court in Chimel v. California, 395 U.S. 752 (1969), and Chambers v. Maroney, 399 U.S. 42 (1970). Chimel held that an arresting officer may search "the arrestee's person and the area 'within his immediate control.'" 395 U.S. at 763. The phrase "area within his immediate control" was construed to mean "the area from within which he might gain possession of a weapon or destructible evidence." 395 U.S. at 763. Chambers, however, limited that search to the time and place of the arrest, since "[o]nce an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest." 399 U.S. at 47, quoting Preston v. United States, 376 U.S. 364, 367 (1964).

The "plain view" exception was developed by the Court in Coolidge v. New Hampshire, 403 U.S. 443 (1971). Basically, the police "may seize evidence in plain view without a warrant." Id. at 465. However, for the doctrine to apply, the police must be legitimately on the premises, by way of a warrant or one of the other recognized warrant exceptions, id. at

465, and the "discovery of evidence in plain view must be inadvertent." Id. at 469. "[P]lain view alone is never enough," Id. at 468; it must be coupled with a warrant or with one of the other exceptions.

A final way in which the Supreme Court has limited the application of the exclusionary rule is by drawing strict standing requirements for defendants who challenge the admissibility of unlawfully seized evidence. At the time Mapp v. Ohio, 367 U.S. 643 (1961), was decided, standing was governed by the case of Jones v. United States, 362 U.S. 257 (1960). Under Jones, "anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him." 362 U.S. at 267.

The broad standing requirements of Jones, however, were somewhat narrowed in Alderman v. United States, 394 U.S. 165 (1969). The Court held there that "suppression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence." Id. at 171-72. The Court recognized the exclusionary rule and reiterated its importance, but stated:

> [W]e are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth.

Id. at 174-75.

United States v. Calandra, 414 U.S. 338 (1974), followed Alderman very closely, while also discussing the "balancing process" used in determining standing. The Calandra Court described the exclusionary rule as "a judically created remedy designed to safeguard Fourth Amendment rights generally

through its deterrent effect, rather than a personal constitutional right of the party aggrieved." Id. at 348.

The most recent pronouncement by the Supreme Court on the subject of standing to challenge evidence seized in violation of the fourth amendment is found in Rakas v. Illinois, 439 U.S. 128 (1978). There the Court adopted the "reasonable expectation of privacy" test of Katz v. United States, 389 U.S. 347 (1967), in cases involving standing. The Court attempted to reconcile Jones v. United States, 362 U.S. 257 (1960), by stating:

> [T]he holding in Jones can best be explained by the fact that Jones had a legitimate expectation of privacy in the premises he was using and therefore could claim the protection of the Fourth Amendment with respect to a governmental invasion of those premises, even though his "interest" in those premises might not have been a recognized property interest at common law.

439 U.S. at 143. Rakas revealed an underlying dissatisfaction with the exclusionary rule by stating that "[e]ach time the exclusionary rule is applied it exacts a substantial social cost for the vindication of Fourth Amendment rights. Relevant and reliable evidence is kept from the trier of fact and the search for truth at trial is deflected." 439 U.S. at 137. Since the Petitioner failed to show that, as a passenger, he had a legitimate expectation of privacy in the glove compartment of the car in which he was riding, he had no standing to challenge the admission of the evidence.

The requirements surrounding arrest warrants are more lenient than those concerning search warrants. Although the Supreme Court has expressed a preference for arrest warrants, Beck v. Ohio, 379 U.S. 89 (1964), the common law rule authorizing felony arrests on probable cause without a warrant remains the law. United States v. Watson, 423 U.S. 411 (1976).

However, police may not make a warantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest. Payton v. New York, 445 U.S. 573 (1980). Nevertheless, an unlawful arrest is not a defense to a criminal action. Frisbie v. Collins, 342 U.S. 519 (1952). The problem in most cases involving an illegal arrest, as is the problem in the present case, is that any search conducted incident to an unlawful arrest is invalidated, thus rendering inadmissible any evidence seized pursuant to the search. The same problems therefore, associated with unlawful searches and seizures are also relevant to arrests made on less than sufficient probable cause. Although a defendant may be guilty, the evidence that proves that fact cannot be used if he was arrested before a police officer's suspicions have hardened into probable cause.

The exclusionary rule is a crude, heavy-handed sanction of doubtful effectiveness. Although there is no doubt that there is a necessity for some sanction, it is now time to explore alternatives to the exclusionary rule. Chief Justice Burger has suggested that "Congress should develop an administrative or quasi-judicial remedy against the government itself to afford compensation and restitution for persons whose Fourth Amendment rights have been violated." Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 422 (1971)(Burger, C.J., dissenting). The exclusionary rule is an impairment to the search for truth; it vastly overreaches its function as a disciplinary measure for police officers. A comparison between our system, with its exclusionary rule, and that of Great Britain, which does not have such a rule, fails to reveal in the British system any of the abuses warned against by proponents of the rule. "Abuse of power by the police is not thought to be a problem

in England and Wales .... The reputation for excellent police work which the British have established and which others envy seem to the foreign observer to be well justified." E. Friesen & I. Scott, English Criminal Justice: An Introduction for American Readers 63-64 (1977). The English procedure consists of rigorous investigation of all complaints against the police, no matter how petty. E. Friesen & I. Scott, supra, at 63. Confessions are evaluated merely on the basis of voluntariness; if voluntary they are admitted, otherwise they are excluded. The Royal Commission on Criminal Procedure, Part II of the Written Evidence of the Commissioner of Police of the Metropolis 145 (1978) [hereinafter cited as Royal Commission]. The standard of voluntariness is admittedly more stringent than the American standard, as evidenced in the case of R. v. Partridge [1836] 7 C. & P. 551, wherein the statement "I should be obliged to you if you would tell us what you know about it; if you will not, of course, we can do nothing," was held to render a confession involuntary. However, evidence discovered as a result of an involuntary confession is admissible, since the involuntariness of a confession only goes to its reliability. Royal Commission, supra, at 148.

To summarize, given the history of the development and application of the exclusionary rule as applied to the states, and its obvious failure to accomplish its stated purpose of deterring unlawful police conduct, we are simply not willing to extend the rule any further than is necessary to comply with decisions of the United States Supreme Court. Therefore, the decision of the Court of Criminal Appeals is reversed, and we remand this case to that court so that the verdict of the trial jury may be reinstated.

REVERSED AND REMANDED.

Maddox, Almon, Shores, and Beatty, JJ., concur.

Faulkner, Jones, and Embry, JJ., would quash the writ and, therefore, dissent.

Adams, J., (not sitting).

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OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

April 10, 1981

Re: 79-732
Ex Parte: State of Alabama, Ex Rel. Attorney General
PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS
(Re: Omar Taylor vs. State of Alabama)
Appellant Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

_____ Appeal docketed. Future correspondence should refer to the above number.

_____ Court Reporter granted additional time to file reporter's transcript to and including

_____ Clerk Register granted additional time to file clerk's record/record on appeal to and including

_____ Appell_____ granted 7 additional days to file briefs to and including

_____ Appellant(s) granted 7 additional days to file reply briefs to and including

_____ Record on Appeal filed

_____ Appendix Filed

_____ Submitted on Briefs

_____ Petition for Writ of Certiorari denied. No opinion.

XXXXX Application for rehearing overruled. No opinion written on rehearing.

_____ Permission to file amicus curiae briefs granted

_____

4-10-81

J. A. Sentell
Clerk, Supreme Court of Alabama

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA
P. O. BOX 351
MONTGOMERY 36101

JOHN O. HARRIS
Presiding Judge
JOHN C. TYSON, III
JOHN P. DeCARLO
JOHN G. BOOKOUT
WILLIAM M. BOWEN, JR.
Judges

MOLLIE JORDAN
Clerk

April 21, 1981

RE: Omar Taylor v. State

3 Div. 118, Montgomery Circuit Court #CC-79-264

The Court of Criminal Appeals today announced the following decision in the above-styled cause:

"April 21, 1981. Affirmed on authority of Ex parte State Re: Taylor v. State, Alabama Supreme Court Ms. 79-732, February 27, 1981. Per Curiam. All the Judges concur."

Office - Supreme Court, U.S.
FILED
DEC 23 1981
ALEXANDER L. STEVAS
CLERK

No. 81-5152

In the Supreme Court of the United States

OCTOBER TERM, 1981

OMAR TAYLOR

Petitioner,

v.

STATE OF ALABAMA

Respondent,

ON THE WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED JULY 27, 1981.
CERTIORARI GRANTED NOVEMBER 2, 1981.

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RELEVANT DOCKET ENTRIES

1.	Judgment and sentence of Trial Court	5/17/79
2.	Notice of Appeal	5/22/79
3.	Record filed	11/21/79
4.	Ruling of the Alabama Court of Criminal Appeals	5/27/80
5.	Ruling of Supreme Court of Alabama	2/27/81
6.	Application for rehearing in Supreme Court of Alabama denied	4/10/81
7.	Stay of Judgement granted for 60 days from 4/21/81 for filing of petition for Writ of Certiorari in the United States Supreme Court	5/11/81
8.	Petition filed	7/27/81
9.	Petition granted by U.S. Supreme Court	11/2/81

CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

TESTIMONY OF R. D. MOBLEY AT SUPPRESSION HEARING

(Trial Transcription, p. 3-16)

(Bracketed page references are to trial transcript pages 3-16)

[3] (The Witness, after having first been duly sworn to tell the truth, the whold truth, and nothing but the truth, took the stand and testified as follows:)

BY MR. BENTLEY:

Q. State your name, please.
A. Rickey Mobley.
Q. How are you employed?
A. Montgomery Police Department; Robbery—Homicide/
Q. How long have you been a policeman?
A. Eight years.
Q. How long have you been a Detective?
A. Since 1975.
Q. How long with Robbery-Homicide?
A. Three Years.
Q. Would that include last December?
A. Yes, sir.
Q. Would it include this January?
A. Yes, sir.
Q. Now, did you play a role in the investigation of the robbery of Moseley's grocery, which occurred on December second of last year?
A. Yes, sir.

[4] Q. Were you the lead detective in the case?
A. The case was originally assigned to me and Hicks, but it was later assigned to Wilson and Duncan.
Q. What role did you play in the arrest of Omar Taylor?
A. I was not present the day he was arrested.

Q. What role did you play in his being interviewed about the robbery?

A. Okay. On . . .

Q. On that day that it happened.

A. On the day that he was arrested?

Q. Yes.

A. I was not there the day that he was arrested, now. I came up with some information on him prior to . . .

Q. On the day that he was arrested and questioned, you did not have anything to do with that?

A. No, sir. I was off that day.

Q. Now, Directing your attention to another case which involves a Charles lee Martin ALIAS Charles Williams, did you have an occasion to talk to that subject?

A. Yes, sir. I did.

Q. Where was he when you talked to him?

A. At the Montgomery Police Department.

Q. Was he in the jail?

A. He was in the interview room in the Detective's offices.

Q. Was he under apprehension for any type of offense?

[5] A. Yes, sir. Charge of rape and robbery.

Q. and, specifically, what was the nature of the charges he was charged with?

A. Charged with the robbery and rape of a lady that runs a store at Mobile and Mildred Street. I don't remember her name nor the name of the business.

Q. To refresh your recollection, Discount Clothing Store, Era Jo Barnes.

A. Yes.

Q. And was Charles Lee Martin ALIAS Charles Lee Williams in custody for that offense which occurred on 12/13/78?

A. Yes, sir.

Q. Did you talk with Charles Lee Martin?

A. Yes, sir, I did.

Q. Did you have to force—Did he give you the information about the robbery we are here for today at Moseley's Grocery?

A. Yes, sir.

Mr. Beno: I am going tp object to what anybody else said who is not a party here today.

The Court: Overruled.

Q. Did you threaten Martin to get him to talk to you?

A. No, sir.

Q. And, the information that he gave you, was that voluntary information from him?

A. Yes, sir.

[6] The Court: Are you setting up probable cause for arrest?

Mr. Bentley: Well, the basis for the arrest of the Defendant here . . .

The Court: Yes, that is what I mean.

Mr. Bentley: Yes, sir.

The Court: And you are using hearsay for probable cause purposes.

Mr. Bentley: That would be the basis of the arrest of Omar Taylor.

The Court: All right. Go ahead.

Q. What did Charles Martin say to you?

A. He said that he had heard that Omar Taylor was involved in the robbery of Moseley's Grocery. What part he took, he doesn't know.

Mr. Beno: Objection. This isn't direct hearsay. This is double hearsay. This is hearsay on hearsay, unless he can say that this Defendant or this person you are speaking of present and had personal knowledge . . .

The Court: Hearsay will support a finding of probable cause, but the informer must be creditable and the basis for believing him must be creditable and the basis for believing him must be creditable shown.

The Court: I think we have to establish both of those.

Mr. Bentley: I am going to elicit from this Detective here some information that this particular Defendant told him. Now, it is my position that while the information that Williams, ALIAS Martin, gave to Detective Mobley might not amount to probable cause, I have cases here I would like to present to the Court at a latter time that show that even if the Court finds that to be the case, any subsequent questioning would still be proper.

[7] The Court: Ask him a question and let's see.

Mr. Bentley: I think there was an objection.

The Court: Ask him a question.

Q. What did Charles Martin say to you about Omar Taylor?

A. He said he had heard that Omar Taylor . . .

Mr. Beno: I will submit an objection to what he had heard.

The Court: I sustain as far as what he was told that somebody else heard. I think that is going to far.

Mr. Bentley: May I speak to that, Your Honor?

The Court: Yes.

Mr. Bentley: I have the case authority—it is not my position that Charles Martin gave this Detective information which amounted to the probable cause. That is not my position. I think the court is entitled to know what the basis was the later arrest of Omar Taylor by another Detective who was out here. Now, if the court finds that it doesn't amount to probable cause, I want the court to make a ruling accordingly. I think the objection Mr. Beno was making goes to the weight of it and whether or not it goes to a valid basis to arrest him rather than to admissibility . . .

[8] The Court: Let me see the case you are talking about.

Mr. Bentley: I have McElroy which says that even if an individual is illegally detained, such detention itself doesn't render a confession obtained during such questioning involuntary and inadmissible. Page 438, Section

200A, I have state versus Johnny Ray Parker, which says a confession is not inadmissible solely because of illegal detention of the accused.

The Court: These questions, it looks to me, you are trying to establish he was legally detained.

Mr. Bentley: Sorry.

The Court: There questions, you are trying to establish that the arrest of Taylor was with probable cause.

Mr. Bentley: Well, sir, I want the Court to know.

The Court: Even if not, that does not throw the confession out. I understand what you are saying.

Mr. Bentley: Right. And I want the court to know everything Martin told the Detective whether hearsay, double hearsay. And make his own judgement as to the basis that it gives them to later pick up Omar Taylor. [9] The Court: You say that probable cause can be based on hearsay. And I agree with you, if the fellow doing the talking is shown to be reasonably creditable or some other reason to attach some creditability or believability to his testimony. Not only on Martin, but the Courts needs some predicate laid on where the fellow that Martin heard it from.

Mr. Bentley: I am not able to lay that predicate.

The Court: Then, I am going to sustain his objection. If that was not true and you could get somebody—X could say that he heard something from Y and Y could be totally irresponsible. Under Agular and Spinilli, I think you have to have some believability. I realize it is not the test of admissibility, but there has to be some reliability in it. And if you show me some reason that Martin had to believe X over here, whoever that was, or some reason that you can show this Court that X was Creditable, I will listen. But until you do that, I sustain his objection.

Mr. Bentley: If my purpose was to show the Court that Martin gave—who incidentally is a Defendant is Cases 248 and 149 which is pending for trial before this Court in April for Rape and Robbery charges—if it

were my purpose in saying that this was a probable cause intention of Mr. Taylor when he was picked up on January 4, then, I think the Court's position would be well founded. But to go a little further, I have a line of cases out of New York which are before the U.S. Supreme Court which recognize the right of the police to arrest individuals on what the New York Court has labeled as reasonable suspicion to a Terry versus Ohio stop and frisk situation which admittedly in the language of these cases is less than probable cause.

The Court: All right. I agree with that. Let's move along.

[10] Mr. Bentley: May I ask him that question.

The Court: You can ask him whatever you want to, but unless you establish some type of creditability on this, whoever Martin heard it from, the Court is going to sustain his objection.

Q. Well, let me ask you this, Detective Mobley: You did talk to Martin?

A. Yes, sir.

Q. And did he give you some information?

A. Yes, sir.

Q. And without going into what the information is, what did you do with that information?

A. I gave this information to Detective Wilson and Duncan and the other members of our robbery team.

Q. And would that include Detective Ed Alford?

A. Yes, sir. He is a Sergeant and at that time was over robbery.

[11] Q. Let's omit that, if anything, Martin told you. Did you receive any other information about Omar Taylor and whether or not he played any role in the robbery of Moseley's Grocery, which is what we are here today for?

A. No, sir, he did not.

Q. So, everything you know about Omar Taylor, this Martin character told you?

A. Yes, sir.

Q. And when was Martin arrested?

A. December 22—it would have been 1978—nryerrn eight and nine a.m. Early that morning.

Q. December 22?

A. Yes, sir.

Q. And I think the testimony in this will show with too much question that Omar Taylor was arrested on January 4. That would be a time span of approximately two weeks?

A. Yes, sir.

Q. Now, within that two-week time span, do you remember when it was you talked to Martin?

A. No, sir. He was talked with on several occasions.

Q. When you got this information from him?

A. Yes, sir. From the time Martin was arrested to the time Taylor was arrested—it would only be a guess —I would say probably within the first week after his arrest. We generally talk to Robbery suspects on numerous occasuins during the first week they are detained. Usually, after they are in jail a few weeks, they want to talk to us or call for us, or we will go back and talk to them.

Q. How did you come to talk to Martin on this particular occasion?

A. We had gotten him out of jail and was talking to him.

[12] Q. What was your purpose of talking to him?

A. To see if there was information that he would like to give us concerning other robberies. We had had several robberies in this same neighborhood. And we felt . . .

Mr. Beno: Your Honor, I am going to object. This has nothing to do with what we are here today for And I am going to object to any superfluous testimony which does not lead us in the direction for which this hearing is laid or predicted.

The Court: If it is irrelevant, the Court is not going to pay any attention to it. But I do not know whether it is relevant or not, so let's see.

Q. What was your purpose in talking to Martin?

A. We had had several robberies in the same neighborhood where the robbery that we had arrested him on. And we felt that either he was involved in some of the robberies or might know who was and might be able to help us on it.

Q. Did he share with you some of his information on other robberies as well?

A. Yes, sir, he did.

Q. Did you ask him about the Moseley's Grocery robbery?

A. Yes, sir.

Q. And is that the robbery that Omar Taylor has been indicted for?

A. Yes, sir.

Q. Now, did he give you some information on that robbery?

A. Yes, sir, he did.

Q. And did that information include statements about Omar Taylor?

[13] A. Yes, sir.

Mr. Beno: Objection unless he can show there is some . . .

Mr. Bentley: I did not ask him what the statement was. I just asked if the statement which he gave included information about Omar Taylor.

Mr. Beno: I withdraw the objection.

Q. Did they?

A. Yes, sir.

Q. And did he mention the names of anybody else?

A. No, sir.

CROSS-EXAMINATION

BY MR. BENO:

Q. Detective Mobley, speaking of creditability, now, you are not going to tell this Court that you feel that Charles Williams Martin is a creditable person, are you?

A. I do not know him that well. I know I arrested him. He has never given me . . .

Q. Would you believe the Defendant . . .

Mr. Bentley: Wait a minute. He cut him off.

A. He has never given me any information before, so I do not know.

Q. Never given you any information previous to this occasion?

A. No, sir.

Q. All right. Would you believe him under oath?

Mr. Bentley: Objection. What kind of question is that?

The Court: I will let him answer it, if he can.

A. In this instance, yes, sir, I did.

Q. What I am saying is would you believe him under oath based on what you know about the Defendant in this case?

A. It would depend on what he was talking about.

Q. But in fact in this case, any information you may have obtained wasn't of the personal knowledge of Mr. Martin?

A. He didn't tell me how he got it. I don't know how he got it.

[14] The Court: hy did you believe in this instance?

The Witness: Because he said that he knew that this guy was involved in a robbery and he was convincing to me. You know, you just have to be there to talk to him.

The Court: What is the basis for your believing this testimony?

The Witness: After having him in jail for several days and talking to him every day or every other day or two, you develop a certain rapport with these people.

The Court: Did he have anything to gain by telling you a falsehood?

The Witness: No, sir. Naturally he wanted us to help him and tell him that we would get him probation and this kind of thing. But I told him I couldn't; that it wasn't in my power; that the only thing I could do for him would be if he cooperated with us, if he helped us clear any other criminal activity, that he would make

this information known to the Court, and what the Court done with it, you know, it would be out of my hands.

The Court: Did you impress upon him the consequences of him telling you a falsehood?

A. Yes, sir. I rold him I did not want any false information causing me to be picking up a lot of wrong people or investigative work unnecessarily.

Q. So, What you are saying, then, based on what he told you, he had no way of knowing other than what he had heard from someone involved in this robbery? In other words, he had to believe his source in order to give you the information he had?

[15] A. Yes, sir, as far as I know. I don't know how he knew. I don't know if he was a party of the robbery hisself. He was a suspect to me at that time.

Mr. Beno: No other questions.

REDIRECT EXAMINATION

[16] BY MR. BENO:

Q. Was there any other than your personal suspicion and based on your conversation with him previously, was there any reason or foundation for which you could believe the Defendant? Were there any—did he give you any places where you may be able to find the money or find any of the weapons or any other element which might give credibility to his statements?

A. No, sir. He didn't say anything else other than the fact that he knew that Omar Taylor was involved in the robbery. He didn't know about where the money, gun, or anything else was.

(At this time the witness was excused and released.)

CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

DEFENDANT'S TESTIMONY AT SUPPRESSION HEARING

(Trial Transcript, p. 47-57)

[47] Q. Once you had signed that—that is, in fact, the second time you had been questioned about this; is that correct? You were questioned in the car?

A. Yes, sir.

Q. And, now you are questioned in the police station?

A. Yes, sir.

Q. And this is the first rights form; is that correct?

A. Yes, sir.

Q. Now, after you had signed that, did you, in fact, get an attorney at that time?

A. No, sir.

Q. What, if any, questions were asked of you at that time after they had you sign the rights form?

A. They asked me did I know where Moseley's Grocery Store was located at. And I told them no. And then it was another fellow, sort of stout fellow with black hair, and he said, "You mean to tell me you do not know where it is located at and you live around here?" And I said, "No. I don't know where it is located at." And, so he said, "Well, we know you robbed the place, because your friend told us you robbed it." And I told them, "I did not rob anything." And, so they said they were going to take me downstairs and put me in a lineup.

[48] Q. Did they threaten you in any way during the interrogation?

A. The heavy-set one with black hair, he threatened to drive my head through the wall.

Q. If I did not stop beating around the bush.

Q. Okay. And how long was it that you were questioned during this period of time?

A. About fifteen, twenty minutes.

Q. When you were taken from questioning, where were you taken to?

A. They took me down into the jail part and I changed my clothes and they put me in a lineup—No. They fingerprinted me first.

Q. And then they put you in a lineup?

A. Yes, sir.

Q. How long did it take for the lineup, if you recall, approximately?

A. A little over—about an hour, I guess.

Q. Now, were you allowed to speak with your attorney at any time that you had previously requested?

A. No, sir.

Q. When you returned from the lineup, what, if anything, unusual happened?

A. When I got out of the lineup they told me to put my clothes back on and I changed from the jail clothes and I put my clothes back on. And they put me in a little cell.

[49] Q. Were you alone?

A. Yes, sir.

Q. How long were you there before they spoke with you again?

A. About ten minutes. Two Detectives came and got me.

Q. And where did they take you at that point?

A. Back upstairs into an office.

Q. And who was present at that time? Were any of the officers present here on Tuesday present at that time?

A. Yes, sir.

Q. What happened then?

A. So, when they took me in the office, one of the Detectives told me that I lied. He said that the lab—the fingerprint expert said that my prings was on the merchandise inside the store. So, he said, "You robbed that place." And I said, "I did not rob anything." So, at that time, another Detective came in and he had a photo . . .

The Court: Had a what?

The Witness: He had a picture.

Q. Are you talking about a picture?

A. A picture.

Q. Okay. What happened then?

A. They took the picture and they looked at me and kept looking at the picture. And he said he resembles the man. And so that is when they called another Detective in there, and they took three pictures of me. And they questioned me a little more about the robbery. And I kept telling them, "I do not know nothing about the robbery." So, one of the officers, the officer who was here the other day, said, "We understand, you are under arrest as of now for armed robbery." And he said, "Your bail is twenty-five thousand dollars." And he took me downstairs.

[50] Q. At that time did you finally have the rights form presented to you again—Oh, was there any conversation about an attorney at this questioning?

A. I asked for an attorney at that time, too. I asked them when did I get a chance to see a Lawyer, and they told me—all they said was you could get one. You will see one.

Q. And finally, you had another meeting with the Detective that evening; is that correct?

A. Yes, sir.

Q. And what happened at that time?

A. That evening, the Detective—the two young Detectives who was in here the other day, they came down and got me that evening. And they took me upstairs. And, when I came upstairs, my girlfriend and two of my neighbors was out there. So, he told me that—He said "I came down to get you because your girlfirend wants to talk to you." He had took me in the room. It was me, him, and the other Detective. So, he said, "We usually don't do this, but I am going to let you talk to your girlfriend." And he gave me a pack of cigarettes and a letter. I got the letter upstairs now. He gave me a letter

and a pack of cigarettes, a letter she had wrote and a pack of cirgarettes that she had brought for me. And he was telling me about I don't understand you know. A guy like you, have a nice girlfriend like that usually don' come down here like this, you know and be following up on somebody. So, then he said, "I want to ask you a couple of questions about the robbery." So, he asked me did I rob the place; did I want to make a statement or anything. And I told him no. I told him I had all ready told them that I didn't rob it. So, at that time, one of the Detectives brought this brother inside that I had knew. So he-a brother named Charles Williams lives on Cobb Street. He told—he said—he said, "You know this gur right here?" and I said, "Yeah, I know him." And he said, "How well do you know him?" And I said, "I know him real good." And he said, "Do you know him well enough to trust him?" said, "Yeah, I trust him.: And he said, "Well, me and Charles been knowing each other for a long time." He said, "Charles been doing me favors."

[51] Q. Who said that?

A. Detective Hicks. And Charles said, "Yeah, he do me favors." And so anyway, he said, "What I am saying is you ain't in no trouble." You know. He said, "We know that you was there because we have your fingerprints." You know. He said that I wasn't picked out of no lineup, but they want to know who else was in there with me when I was in there. So, I told them that . . .

Q. That's okay. Do not tell us who you told them unless you put it on the statement.

[52] A. Right. Well, at that time I told them I didn't know anything about it. so, he asked me a couple of more questions, you know.

Q. Had you signed the next rights form yet?

A. No, I didn't sign the last rights form, you know until after the statement.

Q. Okay. Go ahead.

A. So, he kept questioning me for a little while and said I am going to let your girlfriend come in and talk

to you. And, so he had me and my girlfirend and Charles —Charles Williams. He still was in the room. And he was telling them that I was facing anywhere from ten years to life, you know, but it wasn't as serious as it looked or as it seemed, you know; that I could help myself if I took and come across, you know, and be truthful with them. And he said that if I signed a statement, that he knew the judge and that he would talk to the judge, and it is a possibility that he could get me a suspended sentence probation. And then at that time my girlfriend, she got to crying and upset. And he said, "Well, I will leave ya'll in the room for a while, and ya'll could talk. And I will be back. And he went out and left us in there for about ten minutes.

Q. Then he came back in after you had an opportunity to speak with your girlfriend?

A. Right.

[53] Q. And at that time, did he give you a rights form?

A. No, I never signed—let;s see. If I am not mistaken I signed the rights form right before he took the statement or either after. I have forgotten.

Q. But at that time, he took the statement from you, right?

A. Yes, sir.

Q. Omar, have you eve been convicted of an felonies before?

A. No, sir.

Q. Do you have a criminal record?

A. No, sir.

Mr. Beno: I have no more questions, Your Honor.

CROSS-EXAMINATION

BY MR. BENTLEY:

Q. Up until now did you know who Detective Hicks is?

A. Yes, sir.

Q. He was the one that was there when you signed the statement.

A. Yes, sir.

Q. Did you admit to anybody else that you did the robbery before you talked to Detective Hicks?

A. No, sir.

Q. He was the first one?

A. Yes, sir.

Q. And one of these Detectives got you a Lawyer?

A. No, sir.

Q. And you wanted a Lawyer before they asked you?

A. Yes sir.

Q. But you answered their questions even without a Lawyer?

A. Yes, sir.

[54] Q. Did any Detective ever beat you or hit you or strike you?

A. No.

Q. Had you been drinking?

A. No.

Q. Were you sober?

A. Yes, sir.

Q. Had you had any drugs at all?

A. No.

Q. Did you understand your rights:

A. I was understanding that I would have a Lawyer.

Q. No. Do you remember them reading you your rights?

A. Yes.

Q. Did you understand those rights that they read to you?

A. I had my own understanding of them.

Q. Did you understand . . .

Mr. Beno: He can explain how he understood his rights.

The Court: You can do that. Go ahead.

Q. What did you understand?

A. I was understanding that I signed the form that I would be given an opportunity to speak with a Lawyer.

Q. Why did you feel that way?

A. Because I asked the Detective that and he said I would.

Q. Which one?

A. It was kind of the stout one with blond hair.

Q. Is that the one that you gave the first rights form?

A. Yes.

[55] Q. All right. That is Detective Wilson. did you tell Detective Hicks that you wanted a Lawyer?

A. Yes, sir.

Q. What were the exact words?

A. I asked him when would I get a chance to get a Lawyer.

Q. And did you want a Lawyer before he questioned you?

A. Yes, sir.

Q. But you answered his questions without a Lawyer present; is that correct?

A. Yes, sir.

Q. And, He gave you—he told you what your rights were, didn't he?

A. Yes, sir.

Q. You knew you didn't have to talk to them, didn't you?

A. Yes, sir.

Q. But, knowing that, you did talk to them, is that correct?

A. Right.

Q. And you knew that anything that you said to him could be used against you in Court?

A. Yes, sir.

Q. Did you sign the rights form before or after you signed the statement?

A. I can't really recall whether it was before or after.

Q. Well, if the rights form has 8:50 p.m. and the statement has 9:15 p.m., wouldn't that show that you signed the rights form before you signed the statement?

A. I signed it before.

[56] Q. Your testimony now is that you signed it before; is that correct?

A. Right. I can't—like the night I signed it, I don't remember whether it was before or after.

Q. Well, you knew your rights, didn't you?

A. Right.

Q. Now, if you wanted a Lawyer before you answered any of Detective Hick's questions, then, why did you go ahead and answer his questions without a lawyer when he asked you about the robbery?

A. Well, after he had brought my girlfriend in and he had brought my neighbor in there, and the way things had started going, I just got, you know, I was so upset. I got scared.

Q. What did the Detective do to scare you?

A. He didn't do nothing to me, you know, physically or nothing like that, you know.

Q. I want you to tell the judge anything the Detective did to make you afraid.

A. He didn't do nothing to make me afraid.

Q. You said you were upset and scared. What did the Detective do to get you upset?

A. He had my girlfriend upset.

Q. Well, they let you see your girlfriend, didn't they?

A. Right.

Q. And they told you they didn't usually do that.

[57] A. Right.

Q. But made a special case of letting you see your girlfriend.

A. Right.

Q. And they gave you cigarettes.

A. Yes, sir.

Q. And nobody ever hit you or beat you or anything like that.

A. No.

Mr. Bentley: Okay. I believe that;s all.

Mr. Beno: I owuld like to redirect, Your Honor.

The Court: Sure.

CIRCUIT COURT OF MONTGOMERY COUNTY, ALABAMA

DISCUSSION BETWEEN COURT AND COUNSEL IN REFERENCE TO DEFENDANT'S FINGERPRINTS BEING TAKEN AT TRIAL FOR EVIDENCE.

(Trial Transcript, p. 116-118)

[116] The Court: If one is in custody, it is, as far as I know, permissible to take his fingerprints.

Mr. Bentley: Yes, sir. But you cannot do it like they did in Davis.

The Court: Well, I think Davis said you cannot just throw out a dragnet and get in a bunce of folks and take their fingerprints. That may be what Davis said, but to clarify any confusion that the Court has resulting from—and I have not read Dinoisio yet, but I will.

(At this time, the Court reading.)

The Court: The Court, looking at the totality of circumstances, and I think those two grounds tie together, I think that the confession was voluntary. And I think that there were enough intervening factors between the arrest and the confession, so that is one part. Now, then you come along and you say you object to the fingerprints because of the illegal arrest and because of the language of Davis versus Mississippi. Now, what the Court, as I understand it, Mr. Bentley has requested or do you now request—you made a motion for fingerprints, but I think it may be first that the Defendant who is in custody pursuant to an indictment now . . .

[117] Mr. Bentley: Yes, sir, Judge. The reason I am not only doing that—I am renewing my offer of this right here for the specific reason that . . .

The Court: I am going to sustain his objection to that. I am going to note that the Defendant is now in custody pursuant to an indictment of the Grand Jury. And I

think you should request him, prior to making a motion, to submit to a fingerprint.

Mr. Bentley: I have made that request to his attorney, Your Honor, and his attorney declines.

The Court: All right. Now the Court then would—do you now make a motion to the Court?

Mr. Bentley: I move that the Court require him to submit to taking his fingerprints. And as far as any self-incrimination, I believe the Alabama case of Lindsey versus State 331 So. 2nd, 797, taking of a fingerprint after arrest without counsel does not violate one's fifth amend priviledege against self-incrimination or one's sixth amendment right to counsel; and the testimony of a fingerprint expert is admissible. That takes care of the fifth amendment.

The Court: So, I am going to grant your motion. And by that I am saying that the State is entitled to have the Defendant's fingerprings taken.

[118] I think your record is protected. If you want to protect it anymore, then—I cannot require that, but I might suggest, since you have protected your record, you and Mr. Bentley's might discuss, since you all ready have those prints, if there is any reason to go take the, again.

Mr. Bentley: The main reason we wanted to use these is we have photographic blowups of the prints.

The Court: You all discuss that. I have sustained the objection to that. If you want to take some additional ones, then we will have to do it.

Mr. Beno: Let me talk to my client.

(At this time the fingerprints of the Defendant, Omar Taylor, were taken out of the presence of the Jury or Court Reporter in the Deliberation room, and marked as state's mi,ber four. Subsequent thereto, the following was had and done of record, the Jury being present.?

CIRCUIT COURT OF MONTGOMERY COUNTY, ALAMABA

TESTIMONY OF V. H. HICKS AT TRIAL IN REFERENCE TO THE CONFESSION BY THE DEFENDANT

(Trial Transcription, p. 124-128)

[124] Q. Is that his signature in the witness block as the witness?

A. Yes, sir, it is.

Q. At any point during your interview with Omar Taylor, did he ever ask for a Lawyer?

A. No, sir. He did not.

Q. Did he ever tell you in any way that he did not want to be interviewed?

[125] A. No, sir. He didn't.

Q. And did he—what did you do to make sure he understood what his rights are?

A. He signed this rights form.

Q. Indicating that he fully understood his rights?

A. Yes, sir, He did.

Q. Did he ask you any questions about his rights?

A. No, sir, none at all.

Q. Did he appear to be under the influence of anything; such as alcohol or drugs or medicine or anything of that sort?

A. No, sir, didn't appear to be.

Q. Now, did you talk with him after that?

A. Yes, sir, I did.

Q. And did you ask him some questions and did he tell you some things about the robbery?

A. Yes, sir, he did. He gave me a typewritten statement in regard to the robbery.

Q. Now, throughout your entire interview with Mr. Taylor, did you ever force, threaten, or coerce him into talking to you?

A. No, sir, I did not.

Q. Did you or anyone else in your presence and to your knowledge hit him or strike him or use any type of

mental or physical force against him to persuade and coerce him to talk to you?

[126] No, sir, we didn't.

Q. Now, how does the typewritten statement come to be prepared?

A. It is—the Montgomery Police Department is typed at the top, the place, which the Detective's office, the date, and the time of the Statement of the Defendant's name and address. The statement is taken by myself and the subject that we are talking about, which is robbery of Moseley's Grocery.

Q. That is your heading?

A. Yes, sir.

Q. I mean, how does the statement fit into the interview?

A. Well, usually we talk to the suspect or Defendant, whichever, and ask him about the robbery. In this case he went on and told me about the robbery; told me what happened. And, then I go back and type each sentence. Just as he is telling me, I will type it out.

Q. And at the end of that, there is some specific questions and answers that you ask him and he answers?

A. Yes, sir.

Q. Now, State's exhibit six. is this statement that you prepared on the interview with Mr. Teylor?

A. Yes, sir, it is.

Q. And, after you finished with the statement, is he given an opportunity to review it for accuracy or make any changes?

[127] A. Yes, sir, he has an opportunity to read the entire statement and make any changes that he would like.

Q. Be more specific about what you did in this case.

A. As far as the interview?

Q. Well, as far as his getting to review the statement.

A. Okay. After I finished the statement, I signed it. And I told him, or asked him, to read it. I gave him the original and the othr two copies. And I ask him if he would, to read the statement. At this time, he took it and

he appeared to be reading it for some time. And he told me it was right. And at that time, he signed it.

Q. Did he suggest any changes to it?

A. No, sir.

Q. Okay. There is one place up here on five and six I want to ask you about. What is this marking here in red?

A. That was a typographical error I made and caught, which I put for 1-4-78, and it should be '79.

Q. And whose initials are that?

A. Omar Taylor. He initialed it.

Q. Okay. And this is Omar Taylor's signagure at the bottom of the statement?

A. Yes, sir, it is.

Q. And, also, at the bottom of page one here?

A. Yes, sir.

Q. Okay, Detective Hicks, if you will take the statement and tell the jury what Omar told you.

Mr. Beno: Prior to the statement being given, I would like to voir dire the Witness.

[128] Mr. Bentley: I would object to that. We have been all through that.

The Court: Go ahead. You are entitled to voir dire.

(At this time, an at-bar discussion, out of the hearing of the jury and the courtroom reporter. Subsequent thereto, the following was had and done of the record.

Mr. Beno: I would like to note on the record, I am objecting to the admission of any confession.

Mr. Bentley: I am asking him to read it.

Mr. Beno: Same as offering.

The Court: Are you offering the—State's exhibit six?

Mr. Bentley: I would offer that and number five as well, which is the rights form.

The Court: All right. They will be admitted over your objection.

(At this time, State's exhibits numbered five and six were received into evidence.)

THE STATE OF ALABAMA—
JUDICIAL DEPARTMENT
THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1979-80

OPINION—May 27, 1980

3 Div. 118

OMAR TAYLOR

v.

STATE

Appeal from the Montgomery Circuit Court

HARRIS, PRESIDING JUDGE

Appellant was convicted of robbery and the trial court sentenced him to thirty years in the penitentiary. At arraignment, in the presence of his counsel, he interposed a plea of not guilty and not guilty by reason of insanity. Appellant did not testify in the case in chief and he offered no evidence under his special plea of not guilty by reason of insanity.

Appellant filed a pretrial motion seeking to have his confession suppressed and his arrest declared illegal. A fully blown hearing was held on this motion and much testimony was taken. At the conclusion of the hearing the motion to suppress was overruled and denied.

On December 2, 1978, three black males entered Moseley's Grocery Store located at the intersection of West Jeff Davis Street and Cleveland Avenue at approximately 7:00 p.m. They had previously entered into an agreement to rob the store. There had been a number of robberies in this area of the city of Montgomery in recent weeks and the police officers had initiated an intensive manhunt in an effort to apprehend the robbers. They interviewed a number of suspects in the

course of which they learned that appellant might be involved in the robbery of Moseley's Grocery Store. According to one of the investigating officers the information that appellant might have been involved in the robbery came from a jail inmate who was a suspect in the same robbery Charles Martin was in custody charged with rape and robbery in an unrelated case.

At the suppression hearing Police Officer R. D. Mobley testified that he had numerous conversations with Martin in the course of which Martin told Mobley he had information that appellant was involved in the robbery of the Moseley Grocery Store. Mobley stated that Martin, "didn't tell me how he got it. I don't know how he got it. He did not go into any details or who told him or when or where he obtained the information, but only that he was involved in a robbery . . . He said that he had heard that Omar Taylor was involved in the robbery of Moseley's Grocery. What part he took, he doesn't know."

The trial court was concerned about the credibility and reliability of Mobley's informant and Officer Mobley was questioned along this line and replied, "I do not know him that well. I know I arrested him. He has never given me any information before, so I do not know."

From the record:

> "Q. So, what you are saying, then, based on what he told you, he had no way of knowing other than what he had heard from someone else whether or not the defendant (Taylor) may or may not have been involved in this robbery? In other words, he had to believe his source in order to give you the information he had.
>
> "A. Yes, sir, as far as I know. I don't know how he knew. I don't know if he was a party to the robbery his self. (sic) He was a suspect to me at that time . . . He did not go into any details or who told him or when or where he obtained the in-

formation, but only that he was involved in a robbery.

"Q. Was there anything other than your personal suspicion and based on your conversation with him previously, was there any reason or foundation for which you could believe the defendant (sic)? Were there any—did he give you any places where you may be able to find the money or find any of the weapons or any other element which might give credibility to his statements?

"A. No, sir. He didn't say anything else other than the fact that he knew that Omar Taylor was involved in the robbery. He didn't know where the money, gun or anything else was."

Officer Mobley did not arrest appellant. He referred the information which he had received from inmate Charles Martin to two other officers assigned to the Robbery and Homicide Division of the Montgomery Police Department. These two officers arrested appellant without a warrant on January 4, 1979, at approximately 3:00 p.m., as he emerged from a pool hall on Holt Street. The arrest was based solely on the information furnished them by Officer Mobley following his interview with Charles Martin as set forth above. Upon arresting appellant they informed him who they were and told him that he was being arrested in connection with the robbery that occurred at Moseley's Grocery and Meat Market. They searched him for weapons prior to putting him in the patrol car and transported him to the station house and surrendered him to other detectives for questioning. After appellant was placed in the patrol car one of the officers, from memory, recited to him his constitutional rights. One of the arresting officers, Sergeant Ed Alford, testified that the arrest was made on information furnished by other investigators in the Robbery Division who had interviewed Charles Martin. Acting on this information appellant

was arrested without a warrant as the officer felt that it was necessary to pick him up and check him out. He was asked if he felt the information was sufficient to arrest appellant and he replied, "Well, I did not know because I had never seen him." He was asked if there was any basis on which the credibility of Charles Martin could be established and he answered, "I did not attempt to establish any credibility on him." Officer Alford further stated that the arrestee was not asked if he understood the rights given him and he replied, "I did not ask him anything concerning his rights. I just advised him of his rights."

Mr. and Mrs. John Moseley were in the store on the night of December 2, 1978, when the robbery occurred. Mr. Moseley was at the cash register checking out customers and Mrs. Moseley was in the office near the back of the store when she observed two black men enter the store. One of the robbers entered the office and pulled a pistol on Mrs. Moseley and said, "This is a stick up. Give me all the money in the safe." She told him there was no money in the safe. He again demanded the money and she told him that the safe was old and was not in use any more. He grabbed her by the collar of her coat and forced her from the office and told her to go to the back of the store. As she was leaving the office she looked in the direction of the check-out register and saw her husband and an employee with their hands in the air and another black man pointing a pistol at them. Shortly thereafter she saw two black men exit the store.

Mr. Moseley testified that just before closing time a black man, approximately five feet, five inches tall, came to the check-out counter and placed on the counter a two pound bag of Domino sugar and a package of Zeigler hot dogs. He asked for some lighter flints and when Mr. Moseley turned back around the man was standing there pointing a pistol at him. Mr. Moseley was ordered to open the cash register and give him all the money. Mr. Moseley flipped open the register and the bandit got the

money himself. The amount was $600.00. The bandit then asked for his wallet and Mr. Moseley told him he did not have a wallet. With the pistol still pointed at Mr. Moseley the man again ordered him to produce his wallet. Mr. Moseley then reached in his back pocket and got his wallet which contained eight or nine hundred dollars in large bills and handed the wallet to the man. The man immediately ran from the store. The packages of sugar and hot dogs remained on the counter where the robber had placed them. Mr. Moseley then called the Police Department to report the robbery.

Mr. and Mrs. Moseley were unable to identify either one of the three black men engaged in the robbery at the lineup or in court. The officers were careful in picking up the packages of sugar and hot dogs to process them for latent fingerprints. The fingerprints turned out to be those of appellant and there is no contention to the contrary. The interrogating officers informed appellant that his fingerprints were found on the bags of sugar and hot dogs and he subsequently signed a waiver of rights form and executed a written confession. The proper predicates were laid and the waiver of counsel form as well as the signed confession were admitted into evidence.

Appellant does not question the voluntariness of his confession because it was shown without dispute that he was given the *Miranda* rights and warnings. It was also shown without dispute that no promises, threats, coercion, rewards or hopes thereof were made or held out to him to induce him to make and sign the confessions admitted into evidence. On the other hand appellant contends that he was illegally arrested without probable cause and without an arrest warrant and was involuntarily transported to the station house for interrogation which led to his confession. He urges this court to reverse his conviction on authority of the opinion of the Supreme Court of the United Satets in *Dunaway* v. *New York*, —— U.S. ——, 99 S.Ct. 2248 (1979). A careful reading of the opinion in *Dunaway, supra*, convinces us that it is controlling and

this case must be reversed and remanded. We are left with no other choice.

The facts in this case leading to the arrest and detention of appellant and the facts leading to the arrest and detention of Dunaway are basically indistinguishable. In both cases the information was supplied by a jail inmate awaiting trial on unrelated unsolved crimes but the information supplied was insufficient to obtain an arrest warrant. Nevertheless, other detectives were ordered to pick up the suspects and bring them in for questioning. In each case the suspects were picked up and transported to the station house and placed in an interrogation room where each was questioned by officers after being given the warnings required by *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602. Both waived counsel and eventually made statements that incriminated them in the crimes. Both filed motions to suppress the statements (and in *Dunaway* the sketches of the crime scene—and in appellant's case the fingerprints he left on the packages of sugar and hot dogs) which were denied and both were convicted.

In *Dunaway*, supra, the court held:

> "The central importance of the probable cause requirement to the protection of a citizen's privacy afforded by the Fourth Amendment's guarantees cannot be compromised in this fashion. 'The requirement of probable cause has roots that are deep in our history.' . . . Hostility to seizures based on mere suspicion was a prime motivation for the adoption of the Fourth Amendment, and decisions immediately after its adoption affirmed that 'common rumor or report, suspicion, or even "strong reason to suspect" was not adequate to support a warrant for arrest.' The familiar threshold standard of probable cause for Fourth Amendment seizures reflects the benefit of extensive experience accommodating the factors relevant to the 'reasonableness' requirement of the Fourth

Amendment, and provides the relative simplicity and clarity necessary to the implementation of a workable rule."

The court relied on some quotes from *Brown* v. *Illinois*, 42 U.S. 590, 95 S.Ct. 2254 and *Davis* v. *Mississippi*, 394 U.S. 721, 89 S.Ct. 1394, and went on to say:

> "These passages from Davis and Brown reflect the conclusion that detention for custodial interrogation —regardless of its label—intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest. We accordingly hold that the Rochester police violated the Fourth and Fourteenth Amendments when, without probable cause, they seized petitioner and transported him to the police station for interrogation."

But there is more:

> "There remains the question whether the connection between this unconstitutional police conduct and the incriminating statements and sketches obtained during petitioner's illegal detention was nevertheless sufficiently attenuated to permit the use at trial of the statements and sketches. See Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); Nardone v. United States, 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed.307 (1939); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920).
>
> "The New York courts have consistently held, and petitioner does not contest, that proper Miranda warnings were given and that his statements were 'voluntary' for purposes of the Fifth Amendment. But Brown v. Illinois, supra, settled that '[t]he exclusionary rule, . . . when utilized to effectuate the Fourth Amendment, serves interests and policies that are distinct from those it serves under the Fifth,'

422 U.S., at 601, 95 S.Ct., at 2260, and held therefore that 'Miranda warnings, and the exclusion of a confession made without them, do not alone sufficiently deter a Fourth Amendment violation.' Ibid.

" 'If Miranda warnings, by themselves, were held to attenuate the taint of an unconstitutional arrest, regardless of how wanton and purposeful the Fourth Amendment violation, the effect of the exclusionary rule would be substantially diluted. . . . Arrests made without warrant or without probable cause, for questioning or "investigation," would be encouraged by the knowledge that evidence derived therefrom could well be made admissible at trial by the simple expedient of giving Miranda warnings.' Id., at 602, 95 S.Ct., at 2261.

"Consequently, although a confession after proper Miranda warnings may be found 'voluntary' for purposes of the Fifth Amendment, this type of 'voluntariness' is merely a 'threshold requirement' for Fourth Amendment analysis, 422 U.S., at 604, 95 S.Ct., at 2262. Indeed, if the Fifth Amendment has been violated, the Fourth Amendment issue would not have to be reached.

"Beyond this threshold requirement, Brown articulated a test designed to vindicate the 'distinct policies and interests of the Fourth Amendment.' Id., at 602, 95 S.Ct., at 2261. Following Wong Sun, the Court eschewed any per se or 'but for' rule, and identified the relevant inquiry as 'whether Brown's statements were obtained by exploitation of the illegality of his arrest,' id., at 600, 95 S.Ct., at 2260; see Wong Sun v. United States, 371 U.S. 471, 488, 83 S.Ct. 407, 9 L.Ed. 441 (1963). Brown's focus on 'the causal connection between the illegality and the confession,' 422 U.S., at 603, 95 S.Ct. at 2261, reflected the two policies behind the use of the exclusionary

rule to effectuate the Fourth Amendment. When there is a close causal connection between the illegal seizure and the confession, not only is exclusion of the evidence more likely to deter similar police misconduct in the future, but use of the evidence is more likely to compromise the integrity of the courts.

"Brown identified several factors to be considered 'in determining whether the confession is obtained by exploitation of an illegal arrest[:] [t]he temporal proximity of the arrest and the confession, the presence of intervening circumstances, . . . and particularly, the purpose and flagrancy of the official misconduct . . . And the burden of showing admissibility rests, of course, on the prosecution.' Id., at 603-604, 95 S.Ct., at 2261-62. Examining the case before it, the Court readily concluded that the State had failed to sustain its burden of showing the confession was admissible. In the 'less than two hours' that elapsed between the arrest and the confession 'there was no intervening event of significance whatsoever.' Ibid. Furthermore, the arrest without probable cause had a 'quality of purposefulness' in that it was an 'expedition for evidence' admittedly undertaken 'in the hope that something might turn up.' Id., at 605, 95 S.Ct., at 2262.

"The situation in this case is virtually a replica of the situation in Brown. Petitioner was also admittedly seized without probable cause in the hope that something might turn up, and confessed without any intervening event of significance. Nevertheless, three members of the Appellate Division purported to distinguish Brown on the ground that the police did not threaten or abuse petitioner (presumably putting aside his illegal seizure and detention) and that the police conduct was 'highly protective of defendant's Fifth and Sixth Amendment rights.' 61 A.D.2d, at 303, 402 N.Y.S.2d, at 493. This betrays a lingering

> confusion between 'voluntariness' for purposes of the Fifth Amendment and the 'causal connection' test established in Brown. Satisfying the Fifth Amendment is only the 'threshold' condition of the Fourth Amendment analysis required by Brown. No intervening events broke the connection between petitioner's illegal detention and his confession. To admit petitioner's confession in such a case would allow 'law enforcement officers to violate the Fourth Amendment with impunity, safe in the knowledge that they could wash their hands in the 'procedural safeguards' of the Fifth.' "

If the situation in *Dunaway* is virtually a replica of the situation in *Brown*, as noted by the Supreme Court, then the situation in the instant case is a replica of both *Dunaway* and *Brown*.

Section 200.08 of McElroy's Alabama Evidence, Third Edition, Gamble, reads as follows:

> "It has been said that the irrefutable rule in this state is that even if an individual is illegally detained, such detention in itself does not render a confession, obtained during such detention, involuntary and inadmissible. This holds true whether the accused was arrested without pobable cause, without a warrant or whether he was detained beyond the time by which he should have been taken before a committing magistrate."

Eleven cases from this court and the Supreme Court of Alabama are cited in footnotes under the above quotation. Doubtless there are many more such cases since this Third Edition was published in 1977. For the Bench and Bar to rely on such cases in the future will be extremely dangerous in the light of *Dunaway* v. *New York*, supra. We are loath to reverse a case where the guilt of the accused is so clear and convincing and the guilt drips

from the fingers of both hands, but our path is lighted in *Dunaway* and we are bound to follow this path.

The judgment of conviction is reversed and remanded on authority of *Dunaway*, supra.

REVERSED AND REMANDED.

All the Judges concur, except DeCarlo, J., who dissents with opinion.

DeCarlo, J., dissents.

The United States Supreme Court in *Dunaway* v. *New York*, supra, reiterated the test laid down in *Brown* v. *Illinois*, supra, which articulates several factors that should be considered in determining the question; "[W]hether the connection between this unconstitutional police conduct and the incriminating statements and sketches obtained during petitioner's illegal detention was nevertheless sufficiently attenuated to permit the use at trial of the statements and sketches." Those factors are: (1) the temporal proximity of the arrest and the confession; (2) the presence of intervening circumstance; (3) and particulary, the purpose and flagrancy of the official misconduct.

The situation in the case involving the appellant, Omar Taylor, is distinguishable for that in the case of *Dunaway* v. *New York*, supra, because, in *Dunaway*, the accused made a statement within two hours after interrogation in the absence of an intervening circumstance which would have lessened the connection between his illegal detention and confession. In *Dunaway*, no "intervening circumstance" was present from the time the officers received the inmate's hearsay information, to the time *Dunaway* rendered incriminating statements and sketches.

In the case involving Omar Taylor, the officers, prior to receiving any information from the inmate, did have in their possession fingerprints taken from the bag of sugar and the hotdogs present at the time of the robbery.

Further, at the time the officers picked up Taylor, they had no other information from which an investigation could be commenced, other than the inmate's allegation. The officers could not, at that time, determine the authenticity of the inmate's statement concerning the appellant, Taylor, without a fingerprint comparison. Under these circumstances, it was reasonable for these officers to take Taylor into custody and to determine whether or not he was, in fact, the robber.

As the opinion reflects, prior to making any statement, Taylor was told by the interrogating officers that his fingerprints were found on the bag of sugar and on the bag of hotdogs, and it was after he had learned this information that he signed a waiver of rights form and executed a confession.

It was reasonable for the officers to investigate the information they had received because they were able to verify that information by comparison of fingerprints. The officers in Dunaway did not have an "intervening circumstance," fingerprint evidence for comparison, which lessened the connection between the alleged misconduct by the police and the confession of the defendant.

Therefore, in my judgment based on the foregoing facts, it can not be said that the officers in the present case were engaged in an "expedition for evidence." There existed in the case before us an intervening circumstance, that is, the fingerprint evidence. This "intervening circumstance" sufficiently attenuated any alleged unconstitutional conduct by the police so that the appellant's inculpatory statements were admissible.

For the foregoing reasons, I respectfully dissent.

THE STATE OF ALABAMA—
JUDICIAL DEPARTMENT
THE SUPREME COURT OF ALABAMA

OCTOBER TERM, 1980-81

Ex-parte: State of Alabama, ex rel. Attorney General

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS

79-732

(Re: OMAR TAYLOR

v.

STATE OF ALABAMA)

OPINION—February 27, 1981

TORBERT, CHIEF JUSTICE.

We granted certiorari to review the decision of the Court of Criminal Appeals in *Omar Taylor* v. *State*, [MS. May 27, 1980] —— So.2d —— (Ala. Crim. App. 1980), which reversed the trial court decision. The principal issue presented for our consideration is whether the trial court erred in admitting the fingerprints and confession of the defendant, Omar Taylor. We hold that the evidence was properly admitted, and we reverse the decision of the Court of Criminal Appeals.

At approximately 7:00 p.m. on December 2, 1978, two males entered and robbed Moseley's Grocery Store at the intersection of West Jeff Davis Street and Cleveland Avenue. There had been a number of robberies in this area of Montgomery in recent weeks, and the police initiated an intensive manhunt in an effort to apprehend the culprits. A number of suspects were interviewed, and during the course of the interviews it was learned that Appellant

might be involved in the robbery of Moseley's Grocery Store. According to one of the investigating officers, the information linking Appellant to the robbery came from a jail inmate, Charles Martin, who was himself a suspect in the same robbery. Martin was in custody, charged with rape and robbery in an unrelated case.

At a supression hearing, Police Officer R. D. Mobley testified that during numerous conversations with Martin, he told the officer he had information that Appellant was involved in the robbery of Moseley's Grocery Store. Mobley stated: "[Martin] didn't tell me how he got it. I don't know how he got it. . . . He did not go into any details or who told him or when or where he obtained the information, but only that he was involved in a robbery. . . . He said that he had heard that Omar Taylor [Appellant] was involved in the robbery of Moseley's Grocery. What part he took, he doesn't know."

Officer Mobley did not arrest Appellant. He referred the information which he had received from Martin to two other officers assigned to the Robbery-Homicide Division of the Montgomery Police Department, and these two officers arrested Appellant without a warrant on January 4, 1979. The arrest was based on the information furnished them by Officer Mobley following his interview with Martin.

Upon arresting Appellant, the officers informed him who they were and told him that he was being arrested in connection with the robbery of Moseley's Grocery. After Appellant was placed in the patrol car, one of the officers recited to him his constitutional rights, and, upon arriving at the station house, Appellant was surrendered to other detectives for questioning.

Sergeant Ed Alford, one of the arresting officers, testified that the arrest was made on information furnished by another investigator in the Robbery-Homicide Division who had interviewed informant Martin. Based on this information, Appellant was arrested without a warrant, as the officer felt it necessary to pick him up and check

him out. When asked if he felt his information was sufficient to arrest Appellant, he replied, "Well, I did not know because I had never seen him." Asked if there was any basis on which the credibility of Martin could be established, he answered, "I did not attempt to establish any credibility on him."

Mr. and Mrs. John Moseley were in their store on the night of December 2, 1978, when the robbery occurred. Mr. Moseley was at the cash register checking out customers and Mrs. Moseley was in the office near the back of the store when she observed two men come in. One of the men entered the office, pulled a pistol on Mrs. Moseley and said, "This is a stick up. Give me all the money in the safe." When she told him there was no money in the safe, he repeated the demand, whereupon she told him that the safe was old and was not in use. He grabbed her by her collar, forced her from the office, and told her to go to the back of the store. As she was leaving the office, she glanced in the direction of the check-out register and saw her husband and an employee with their hands in the air and another man pointing a pistol at them. Shortly thereafter, she saw two men exit the store.

Mr. Moseley testified that just before closing time a man, approximately five feet, five inches tall, came to the checkout counter with a two-pound bag of Domino sugar and a package of Zeigler hot dogs. He then asked for some lighter flints. Mr. Moseley turned away to get the flints, and when he turned back around, the man pointed a pistol at him and ordered him to open the cash register. Mr. Moseley flipped open the register, from which the bandit took $600.00. The bandit then demanded his wallet. Mr. Moseley told him he did not have a wallet. When the man again ordered him to produce his wallet, Mr. Moseley then reached in his back pocket and got his wallet which contained eight or nine hundred dollars. He handed the wallet to the robber. The man immediately ran from the store, but left the packages of sugar and

hot dogs on the counter. Mr. Moseley then called the police.

Mr. and Mrs. Moseley were unable to identify either of the men engaged in the robbery, either at a lineup or in court. Fingerprints on the sugar and weiners turned out to be those of Appellant. This fact was undisputed. The interrogating officers informed Appellant that his fingerprints were found on the bags of sugar and hot dogs. Subsequently, he signed a waiver of rights form and executed a written confession. The form and signed confession were later admitted into evidence.

Appellant does not question the voluntariness of his confession, as it was shown to have been given in compliance with *Miranda*. Additionally, no promises, threats, coercion, rewards or hopes thereof were made or held out to Appellant to induce him to make and sign the confession. Appellant contends, however, that he was illegally arrested without probable cause and without an arrest warrant, and was involuntarily transported to the station house for interrogation which thereafter led to his confession.

The United States Supreme Court, in *Brown* v. *Illinois*, 422 U.S. 590 (1975), held that the question of whether a confession has been purged of the taint of an illegal arrest under *Wong Sun* v. *United States*, 371 U.S. 471 (1963), "must be answered on the facts of each case." 422 U.S. at 603. We are of the opinion that the facts in the case before us fall somewhere between those surrounding the confession in *Wong Sun*, where the Court held that the connection between Wong Sun's unlawful arrest and his statement "had become so attenuated as to dissipate the taint," 371 U.S. at 491, quoting *Nardone* v. *United States*, 308 U.S. 338, 341 (1939), and those in *Dunaway* v. *New York*, 442 U.S. 200 (1979), *Brown* v. *Illinois*, 422 U.S. 590 (1975), and *Davis* v. *Mississippi*, 394 U.S. 721 (1969), where the Court held that the confessions were tainted by the unlawful arrests. We must therefore determine on which side of the line separating admissible

confessions from inadmissible ones the confession of Omar Taylor falls.

In *Dunaway*, the petitioner was arrested without probable cause in hopes that something would "turn up." 442 U.S. at 218. Less than an hour after he reached the police station, after being informed of his *Miranda* rights, he waived counsel and made the first of two statements and drew sketches that eventually incriminated him. 442 U.S. at 203. Between the time of Dunaway's arrest and that of his confession, "no intervening event of significance whatsoever" took place. 442 U.S. at 218.

Brown contained facts similar to those in *Dunaway*. Petitioner Brown was arrested without probable cause and made a statement shortly thereafter. The State of Illinois argued that the *Miranda* warnings were sufficient to attenuate the taint of the illegal arrest. The Court held that "[t]he *Miranda* warnings are an important factor . . . in determining whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factor to be considered." 422 U.S. at 603. Three additional factors were then set out by the Court to aid in determining whether the taint of an illegal arrest has been attenuated. They are: "[1] [t]he temporal proximity of the arrest and the confession, [2] the presence of intervening circumstances, and . . . [3] the purpose and flagrancy of the official misconduct." *Id.* at 603-04 (citations omitted).

In *Davis*, the police in Meridian, Mississippi, without warrants, picked up 24 Negro youths over a period of 10 days and took them to police headquarters, where they were questioned briefly, fingerprinted, and then released without being charged. 394 U.S. at 722. Davis was subsequently arrested, without a warrant and without probable cause, and fingerprinted again. The second set of fingerprints, along with the fingerprints of 23 others, was sent to the FBI for comparison with prints taken from the scene of the crime. *Id.* The FBI matched Davis's prints to those of the perpetrator of the crime, and he

was indicted. *Id.* at 723. The Court held that the fingerprints should be suppressed as the fruit of an illegal arrest. *Id.* at 728.

The Court held in *Wong Sun*, however, that where the defendant was lawfully arraigned and released on his own recognizance, and several days later voluntarily returned to the police station and made a statement, the taint had been attenuated. 371 U.S. at 491. On the other hand, statements made by Toy, another defendant in the case, at the time he was illegally arrested, and contraband seized during his arrest, were suppressible, since the statement did not result from "an intervening independent act of free will." *Id.* at 486.

While there admittedly has not been the same degree of attenuation here as in *Wong Sun*, neither is the statement as closely connected to the illegal arrest as in *Dunaway*, *Brown*, and *Davis*. Taylor had been under arrest for more than six hours when he made his statement. During that time he had been allowed to converse privately with his girlfriend and a male companion. He had been given his *Miranda* rights on three separate occasions. Additionally, subsequent to Taylor's arrest but prior to his confession, an arrest warrant was filed based on a comparison between his fingerprints and those found at the scene of the crime. In *Johnson* v. *Louisiana*, 406 U.S. 356 (1972), the Supreme Court held that where, prior to a lineup, the defendant was brought before a committing magistrate who advised him of his rights and set bail, the lineup was "sufficiently distinguishable to be purged of the primary taint." *Id.* at 365. Since a similar finding of probable cause separated the arrest and confession of Omar Taylor, it would seem that the taint has been purged here as it was in *Johnson*.

The exclusionary rule is especially harsh in situations such as this, where the motion to suppress involves a confession that is admittedly voluntary and where *Miranda* rights were given, not just once, but three times. The development of the rule reveals that it is a "judicially created means of effectuating the rights secured by the

Fourth Amendment," *Stone* v. *Powell*, 428 U.S. 465, 482 (1976), rather than a constitutionally required sanction. It is not coextensive with the fourth amendment. *Wolf* v. *Colorado*, 338 U.S. 25, 29 (1949).

The roots of the rule can be found in *Boyd* v. *United States*, 116 U.S. 616 (1886). In that case the Court held that the federal government could not subpoena incriminating documents from criminal defendants. 116 U.S. at 638. The Court stated:

> Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other.

Id. at 630.

Twenty-eight years later, in *Weeks* v. *United States*, 232 U.S. 383 (1914), the Supreme Court made a definitive ruling that evidence seized by federal agents in violation of the fourth amendment was inadmissible in federal court. If evidence may be seized illegally and placed into evidence, the Court held, the fourth amendment "might as well be stricken from the Constitution." *Id.* at 393. At that time, however, the fourth amendment was not thought to be applicable to the states. *Id.* at 398.

Silverthorne Lumber Co. v. *United States*, 251 U.S. 385 (1920), went one step further than *Weeks* and *Boyd*. In *Silverthorne*, the Court held not only that evidence illegally seized must be excluded in federal court, but also that a prosecutor may not admit copies of the evidence made while it was unlawfully in his possession, nor may knowledge gained from the unlawfully seized evidence be the basis of a search warrant. *Id.* at 392. The evidence, however, did not become "sacred and inaccessible," but could be obtained "[i]f knowledge of [it] is gained from

an independent source." *Id.* The Court stated that "[t]he essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all." *Id.*

The Court held for the first time, in *Wolf* v. *Colorado*, 338 U.S. 25 (1949), that the fourth amendment applies to the states. There the Court said that "[t]he security of one's privacy against arbitrary intrusion by the police . . . is basic to a free society." *Id.* at 27. The Court further stated that the fourth amendment is "implicit in the concept of ordered liberty," and therefore is "enforceable against the States through the Due Process Clause." *Id.* at 27-28. The Court declined, however, to apply the exclusionary rule to the states, holding that "the ways of enforcing such a basic right raise questions of a different order," *Id.* at 28, and that "it is not for this Court to condemn as falling below the minimum standards assured by the Due Process Clause a State's reliance upon other methods which, if consistently enforced, would be equally effective." *Id.* at 31.

The *Wolf* holding was reinforced in *Irvine* v. *California*, 347 U.S. 128 (1954), but the Court indicated there that violation of an individual's fourth amendment rights by state officials might constitute a crime under federal statutory law. *Id.* at 137. Mr. Justice Jackson, writing for a plurality, directed the Clerk of the Supreme Court to "forward a copy of the record in this case, together with a copy of this opinion, for attention of the Attorney General of the United States." *Id.* at 138. However, two of the four Justices making up the plurality did not join in this directive. *Id.*

In *Rea* v. *United States*, 350 U.S. 214 (1956), an injunction was sought against a federal agent who proposed to testify in state court as to evidence gained through an illegal search and seizure. *Id.* at 216. The Court directed that the injunction be granted, basing its ruling on its "supervisory powers over federal law enforcement agen-

cies." *Id.* at 217. The exclusionary rule, however, was still not made applicable to the states.

The so-called "silver platter doctrine" was overruled in *Elkins* v. *United States*, 364 U.S. 206 (1960). Although federal agents could not use evidence they themselves had seized unlawfully, evidence given to them by state officials could be admitted into federal court, regardless of how it had been obtained. The evidence was thus handed to federal agents on a "silver platter." The exclusionary rule was still not applied to the states, but the Court did hold that the exclusionary rule was the "only effectively available way" to deter law enforcement officials from violating the fourth amendment. *Id.* at 217.

The exclusionary rule was finally applied to the states the next year, in *Mapp* v. *Ohio*, 367 U.S. 643 (1961). There the Court held that it was "clos[ing] the only courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of that basic right, reserved to all persons as a specific guarantee against that very same unlawful conduct." *Id.* at 654-55. The Court found that in so holding it ended the practice of federal agents "step[ping] across the street to the State's attorney with their unconstitutionally seized evidence." *Id.* at 658. The Court cited *Irvine* for the propsoition that "[t]he obvious futility of relegating the Fourth Amendment to the protection of other remedies has . . . been recognized by this Court since *Wolf*." *Id.* at 652-53.

The exclusionary rule has been highly criticized, both from within and without the United States Supreme Court. The justification for the rule is generally stated to be deterrence. *Stone* v. *Powell*, 428 U.S. 465, 486 (1976). Early cases also set out the preservation of "judicial integrity" as a justification for the rule, but this theory has been largely abandoned. *Id.* at 485. *See, United States* v. *Peltier*, 422 U.S. 531 (1975). The exclusionary rule is more or less unique to the United States among common law countries. *Bivens* v. *Six Un-*

known Named Agents of the Federal Bureau of Narcotics, 403 U.S. 388, 415 (1971) (Burger, C.J., dissenting). *See Kuruma v. The Queen*, [1955] A.C. 197. *See generally* "The Exclusionary Rule under Foreign Law," 52 J. Crim. L.C. & P.S. 271 (1961). Laymen generally view the exclusionary rule as a "technicality" that releases known criminals into society. *See* Wilkey. "The Exclusionary Rule: Why Suppress Valid Evidence?" 62 Judicature 214, 223 (1978). Evidence suppressed under the fourth amendment is not inherently unreliable, as are involuntary confessions, suppressed under the fifth amendment, and unduly suggestive line-ups, suppressed under the fifth and sixth amendments. *See*, Oaks, "Studying the Exclusionary Rule in Search and Seizure," 37 U. Of Chi. L. Rev. 665, 737-38 (1979). Additionally, the Court has consistently ruled that a criminal defendant may be forcibly abducted from another state or country and brought into jurisdiction to stand trial. *Frisbie* v. *Collins*, 342 U.S. 519 (1952). *Also see* Oaks, *supra*, at 669. By refusing to bring out the whole truth, critics have charged, the courts allow the truth to be completely distorted. "Undeniable facts, of the greatest importance, are forever barred. . . ." Wilkey, *supra*, at 222.

One of the more compelling criticisms leveled against the rule is that it does not accomplish the stated objective, *i.e.*, deterrence. In 1960, when some states were still operating without the exclusionary rule, the United States Supreme Court stated in *Elkins* v. *United States*, 364 U.S. 206 (1960), that "[e]mpirical statistics are not available to show that the inhabitants of states which follow the exclusionary rule suffer less from lawless searches and seizures than do those of states which admit evidence unlawfully obtained." *Id.* at 218. *See also*, *Irvine* v. *California*, 347 U.S. 128, 136 (1954), where the Court said, "There is no reliable evidence known to us that inhabitants of those states which exclude the evidence suffer less from lawless searches and seizures

than those of states that admit it." Chief Justice Burger further developed this idea in his dissenting opinion in *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (Burger, C.J., dissenting). There he stated that the effect of the exclusionary rule on police conduct is lessened by the long time lapse between the original police action and the final judicial evaluation. The Chief Justice surmised that "[g]iven a policeman's pressing responsibilities, it would be surprising if he ever becomes aware of the final result after such a delay." 403 U.S. at 417. Additionally, Burger continued, "[T]he exclusionary rule's deterrent impact is diluted by the fact that there are large areas of police activity that do not result in criminal prosecutions." 403 U.S. at 417-18. There are several motivations that prompt arrests and searches and seizures by police other than criminal prosecution. These include

> [1] arrest or confiscation as a punitive sanction (common in gambling and liquor law violations), [2] arrest for the purpose of controlling prostitutes and transvestites, [3] arrest of an intoxicated person for his own safety, [4] search for the purpose of recovering stolen property, [5] arrest and search and seizure for the purpose of "keeping the lid on" in a high crime area or of satisfying public outcry for visible enforcement, [6] search for the purpose of removing weapons or contraband such as narcotics from circulation, and [7] search for weapons that might be used against the searching officer.

Oaks, "Studying the Exclusionary Rule in Search and Seizure," 37 U. of Chi. L. Rev. 665, 721-22 (1970). This multiplicity of goals for an arrest or a search and seizure is in sharp contrast to the limited number of reasons for line-ups and confessions, two other types of commonly excluded evidence. The predominant incentive for the latter two is to obtain evidence for use in court.

Oaks, *supra*, at 722. If the evidence is not to be used in court, the possibility of exclusion is a hollow threat.

Even worse than the lack of deterrence, however, is the conduct that the rule does promote among police officers. In a study conducted by Dallin Oaks pursuant to a grant from the National Institute of Law Enforcement and Criminal Justice of the United States Department of Justice, Professor Oaks concluded that "some experienced [police] officers will 'twist' the facts in order to prevent suppression of evidence and release of persons whom they know to be guilty." Oaks, "Studying the Exclusionary Rule in Search and Seizure," 37 U. of Chi. L. Rev. 665, 739-40 (1970). Oaks further stated that subsequent to *Mapp*, "the police were fabricating testimony in order to comply with arrest formalities and circumvent the exclusionary rule." *Id.* at 708.

A further criticism of the rule is that it fails to "provide effective and meaningful compensation to those citizens, particularly innocent victims of illegal searches and seizures." Wilkey, "The Exclusionary Rule: Why Suppress Evidence?" 62 Judicature 214, 228 (1978). The "compensation" provided for the victims of an illegal arrest or search and seizure is irrational in that "the guilty are over-rewarded by a commutation of all penalties for crimes they did commit and the innocent are never compensated for the injuries they suffered." Wilkey, *supra*, at 228. The policeman who engages in the unlawful conduct is rarely, if ever, subject to any type of personal sanction. *See, Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 416 (1971) (Burger, C.J., dissenting); Oaks, "Studying the Exclusionary Rule in Search and Seizure," 37 U. of Chi. L. Rev. 665, 724 (1970). The immediate sanction that is triggered by the exclusionary rule is against the prosecutor, whose case against a criminal is either weakened or destroyed. The prosecutor, however, is not an official of the police department. The exclusionary rule is well tailored to deter the prosecutor from

illegal conduct. However, he is not the guilty party in an unlawful arrest or search and seizure, and he rarely, if ever, has control over those who are, the police. *See* 403 U.S. at 416, Oaks, *supra*, at 726.

Furthermore, the exclusionary rule "fails to discriminate between the degrees of culpability of the officer or the degree of harm to the victim of the illegal search and seizure." Wilkey, "The Exclusionary Rule: Why Suppress Valid Evidence?" 62 Judicature 214, 225-26 (1978). Regardless of whether there is a mere technical violation, such as a defective warrant, or a gross violation of the fourth amendment, such as was seen in *Mapp* v. *Ohio*, 367 U.S. 643 (1961), the penalty is the same; the evidence is excluded. Wilkey, *supra*, at 226. In contrast, the judicial system customarily applies different standards to crimes that vary as to seriousness, such as in granting bail and in imposing sentence. *Id.* Additionally, even though "[i]nadvertent errors of judgment that do not work any grave injustice will inevitably occur under the pressure of police work," *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 418 (1971) (Burger, C.J., dissenting), these errors are, from a law enforcement standpoint, impossible to correct. Once the unlawful search or arrest is made, it is often difficult or impossible to convict the defendant involved, irrespective of his guilt. E. Griswold, *Search and Seizure: A Dilemma of the Supreme Court* 57 (1975). The courts make decisions as to the legality of arrests and searches and seizures "after full briefs and oral arguments, . . . with full deliberation within the court, and often with numerous and vigorous dissents." E. Griswold, *supra*, at 52. The same decisions must be made by police officers "usually in a moment or two, with no opportunity for deliberation and in the stress of immediate action." E. Griswold, *supra*, at 52.

The tenor of the criticism of the exclusionary rule was summed up by Wigmore when he stated that "the

two effects of the exclusionary rule are to produce a troublesome grist for the courts and to return rascals to the practice of their nefarious trades." 8 J. Wigmore, *Evidence in Trials at Common Law* (rev. by J. McNaughton) § 2184a at 52 (1961). More important than the outside criticism, however, is the criticism of the exclusionary rule by members of the United States Supreme Court. In the past five years, the members of the Court have, in their opinions, evidenced more and more restraint in the application of the rule.

This "backing off" process began as early as 1954. In that year, the Court decided the case of *Walder* v. *United States*, 347 U.S. 62 (1954). There it held that if a defendant asserts on direct examination that he has never seen or possessed evidence seized unlawfully (there, narcotics), the evidence may be admitted solely for purposes of impeachment. *Id.* at 64. The Court stated:

> It is one thing to say that the government cannot make an affirmative use of the evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. Such an extension of the *Weeks* doctrine would be a perversion of the Fourth Amendment.

Id. at 65.

In *Linkletter* v. *Walker*, 381 U.S. 618 (1965), the Court ruled that its decision in *Mapp* v. *Ohio*, 367 U.S. 643 (1961), was not retroactive. In support of this conclusion, the Court stated that "the fairness of the trial is not under attack," 381 U.S. at 639, and that "the ruptured privacy of the victims' homes and effects cannot be restored." 381 U.S. at 637.

The Court recognized in *Terry* v. *Ohio*, 392 U.S. 1 (1968), that the exclusionary rule is an imperfect tool for controlling police misconduct. There it stated:

> Regardless of how effective the [exclusionary] rule may be where obtaining convictions is an important objective of the police, it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forego successful prosecution in the interest of serving some other goal.

Id. at 14. *Terry* carved out an exception to the warrant requirement in the area of "stop and frisk," lowering the requirement in that situation from probable cause to "whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Id.* at 27.

Desist v. *United States*, 394 U.S. 244 (1969), continued the rationale of *Terry* when it refused to apply retroactively *Katz* v. *United States*, 389 U.S. 347 (1967), the case which defined the limits of fourth amendment protection in terms of reasonable expectation of privacy, 389 U.S. at 353. The Court stated that "we simply decline to extend the court-made exclusionary rule to cases in which its deterrent purpose would not be served." 394 U.S. at 254 n.24.

Chief Justice Burger's vigorous dissent in *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388 (1971), has previously been noted, but even the majority opinion in that case was not completely favorable to the exclusionary rule. The majority found it necessary to recognize a cause of action for damages by citizens subjected to unlawful searches and seizures against the officials who violated their fourth amendment rights. *Id.* at 397.

Michigan v. *Tucker*, 417 U.S. 433 (1974), was a case involving violation of fifth amendment rights. It was, however, highly critical of the exclusionary rule. The Court there stated:

> Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot

> realistically require that policemen investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the vagaries of human nature would make such an expectation unrealistic. Before we penalize police error, therefore, we must consider whether the sanction serves a valid and useful purpose.

Id. at 446. The Court went on to say that "[w]here the official action was pursued in complete good faith . . . the deterrence rationale loses much of its force." *Id.* at 447.

The Court made an even stronger statement in *United States* v. *Peltier*, 422 U.S. 531 (1975). There it stated that "evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." *Id.* at 542. Peltier declined to apply retroactively the rule of *Almeida-Sanchez* v. *United States*, 413 U.S. 266 (1973), which requires a warrant for border searches made elsewhere than at established border crossings.

The Court found in *United States* v. *Ceccolini*, 435 U.S. 268 (1978), that the taint of an unlawful search and seizure is much easier to attenuate where the evidence discovered was the identity of a live witness who later testified at trial. "The penalties visited upon the Government, and in turn upon the public, because its officers have violated the law must bear some relation to the purposes which the law is to serve," the Court stated. *Id.* at 279. Mr. Justice Rehnquist, writing for the Court, concluded that "the degree of free will exercised by the witness is not irrelevant in determining the extent to which the exclusionary rule will be advanced by its application." *Id.* at 276.

Even more compelling than the language cited from the foregoing cases, however, are the numerous exceptions to the exclusionary rule the Court has created over

the years. Although "a search conducted without a warrant issued upon probable cause is *per se* unreasonable," *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 219 (1973), and "the burden is on those seeking [an] exemption [from the requirement] to show the need for it," *Chimel* v. *California*, 395 U.S. 752, 762 (1969), quoting *United States* v. *Jeffers*, 342 U.S. 48, 51 (1951), the Court has recognized that "[t]here are exceptional circumstances in which, on balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate's warrant for search may be dispensed with." *Johnson* v. *United States*, 333 U.S. 10, 14-15 (1948). These exceptions have multiplied over the years, and have seriously limited the scope of the warrant requirement and, *a priori*, the exclusionary rule.

The first exception to be recognized by the Supreme Court was the automobile exception. It held in 1925, in the case of *Carroll* v. *United States*, 267 U.S. 132 (1925), that a warrant to search an automobile could be dispensed with since "[b]efore a warrant could be secured the automobile would be beyond the reach of the officer." *Id.* at 146. The Court went on to say, however, that the officer carrying out the search must possess "a belief, reasonably arising out of circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction." *Id.* at 149. In other words, there must be probable cause for the search. This mandate has been required in all cases setting out exceptions to the warrant requirement. The automobile exception was further developed in *Chambers* v. *Maroney*, 399 U.S. 42 (1970). There the Court again focused on the mobility of the car, and held further that a car could be searched without a warrant even after the suspect-driver of the automobile had been arrested and the car had been driven to the police station. However, the Court limited the exception in the case of stationary cars in *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971), stating that "[t]he word 'automo-

bile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." 403 U.S. at 461-62. More recently, the Court has held that police may make a warrantless search of an automobile at the station house for the purpose of making an inventory of its contents. *South Dakota* v. *Opperman*, 428 U.S. 364 (1976). The justification for this rule is threefold. First, the police have the responsibility of protecting the owner's property while it remains in police custody. Second, the police may conduct an inventory to protect themselves against claims or disputes over lost or stolen property. Third, an inventory will protect police and the public from potential hazards, such as bombs or other explosive devices. 428 U.S. at 369. An inventory may be made not only of cars driven by persons who have been arrested, but also of cars abandoned or towed away for parking violations. 428 U.S. at 368.

A second exception promulgated by the Court was the "evanescent evidence" exception. This exception applies to evidence that is either of short duration or highly destructible. *Schmerber* v. *California*, 384 U.S. 757 (1966), dealt with the suppression of a blood-test for the purpose of showing the percentage of alcohol in the defendant's blood. The Court recognized that "the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system." *Id.* at 770. Because of the short duration of the existence of this type of evidence, and because of the length of time necessary to procure a warrant, the Court held that "the attempt to secure evidence of blood-alcohol content in this case was an appropriate incident to petitioner's arrest." *Id.* at 771. In *Cupp* v. *Murphy*, 412 U.S. 291 (1973), the Court extended this doctrine to searches and seizures of evanescent evidence that were not incident to arrests. There the police took fingernail scrapings from a suspect who was present at the police station but who was not under arrest. The validation of the search was premised on

"the existence of probable cause, the very limited intrusion undertaken incident to the station house detention, and the ready restructibility of the evidence." 412 U.S. at 296.

The Court set forth the so-called "hot pursuit" exception in *Warden* v. *Hayden*, 387 U.S. 294 (1967). There the Court upheld the search of a residence for "a suspected felon, armed, within the house into which he had run only minutes before the police arrived." *Id.* at 299. The scope of the search, the Court held, is "as broad as may reasonably be necessary to prevent the dangers that the suspect at large in the house may resist or escape." *Id.* The Court justified its holding on the ground that "[t]he Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others." *Id.* at 298-99.

A search warrant is not required when the party in control of the searched premises gives his consent to the search, *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 222 (1973). The consent, however, must be "freely and voluntarily given," and the prosecution has the burden of proving voluntariness, *Bumper* v. *North Carolina*, 391 U.S. 543, 548 (1968). Consent given after a claim of authority to search by a police officer is not valid, since he has in effect told the occupant of the house that he has no right to resist the search. "Where there is coercion there cannot be consent." 391 U.S. at 550. However, "knowledge of a right to refuse is not a prerequisite of a voluntary consent." 412 U.S. at 234. Although consent may not be coerced, either explicitly or implicitly, "[v]oluntariness is a question of fact to be determined from all the circumstances." 412 U.S. at 248-49. While knowledge of the right to refuse consent to a search, or lack thereof, is a factor to be considered in assessing voluntariness, it is not determinative. 412 U.S. at 249.

The permissible limits of a search incident to arrest were set out by the Court in *Chimel* v. *California*, 395

U.S. 752 (1969), and *Chambers* v. *Maroney*, 399 U.S. 42 (1970). *Chimel* held that an arresting officer may search "the arrestee's person and the area 'within his immediate control.'" 395 U.S. at 763. The phrase "area within his immediate control" was construed to mean "the area from within which he might gain possession of a weapon or destructible evidence." 395 U.S. at 763. *Chambers*, however, limited that search to the time and place of the arrest, since "[o]nce an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest." 399 U.S. at 47, quoting *Preston* v. *United States*, 376 U.S. 364, 367 (1964).

The "plain view" exception was developed by the Court in *Coolidge* v. *New Hampshire*, 403 U.S. 443 (1971). Basically, the police "may seize evidence in plain view without a warrant." *Id.* at 465. However, for the doctrine to apply, the police must be legitimately on the premises, by way of a warrant or one of the other recognized warrant exceptions, *id.* at 465, and the "discovery of evidence in plain view must be inadvertent." *Id.* at 469. "[P]lain view *alone* is never enough," *id.* at 468; it must be coupled with a warrant or with one of the other exceptions.

A final way in which the Supreme Court has limited the application of the exclusionary rule is by drawing strict standing requirements for defendants who challenge the admissibility of unlawfully seized evidence. At the time *Mapp* v. *Ohio*, 367 U.S. 643 (1961), was decided, standing was governed by the case of *Jones* v. *United States*, 362 U.S. 257 (1960). Under *Jones*, "anyone legitimately on premises where a search occurs may challenge its legality by way of a motion to suppress, when its fruits are proposed to be used against him." 362 U.S. at 267.

The broad standing requirements of Jones, however, were somewhat narrowed in *Alderman* v. *United States*, 394 U.S. 165 (1969). The Court held there that "sup-

pression of the product of a Fourth Amendment violation can be successfully urged only by those whose rights were violated by the search itself, not by those who are aggrieved solely by the introduction of damaging evidence." *Id.* at 171-72. The Court recognized the exclusionary rule and reiterated its importance, but stated:

> [W]e are not convinced that the additional benefits of extending the exclusionary rule to other defendants would justify further encroachment upon the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth.

Id. at 174-75.

United States v. *Calandra*, 414 U.S. 338 (1974) followed *Alderman* very closely, while discussing the "balancing process" used in determining standing. The *Calandra* Court described the exclusionary rule as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *Id.* at 348.

The most recent pronouncement by the Supreme Court on the subject of standing to challenge evidence seized in violation of the fourth amendment is found in *Rakas* v. *Illinois*, 439 U.S. 128 (1978). There the Court adopted the "reasonable expectation of privacy" test of *Katz* v. *United States*, 389 U.S. 347 (1967), in cases involving standing. The Court attempted to reconcile *Jones* v. *United States*, 362 U.S. 257 (1960), by stating:

> [T]he holding in *Jones* can best be explained by the fact that Jones had a legitimate expectation of privacy in the premises he was using and therefore could claim the protection of the Fourth Amendment with respect to a governmental invasion of those premises, even though his "interest" in those premises might not have been a recognized property interest at common law.

439 U.S. at 143. *Rakas* revealed an underlying dissatisfaction with the exclusionary rule by stating that "[e]ach time the exclusionary rule is applied it exacts a substantial social cost for the vindication of Fourth Amendment rights. Relevant and reliable evidence is kept from the trier of fact and the search for truth at trial is deflected." 439 U.S. at 137. Since the Petitioner failed to show that, as a passenger, he had a legitimate expectation of privacy in the glove compartment of the car in which he was riding, he had no standing to challenge the admission of the evidence.

The requirements surrounding arrest warrants are more lenient than those concerning search warrants. Although the Supreme Court has expressed a preference for arrest warrants, *Beck* v. *Ohio*, 379 U.S. 89 (1964), the common law rule authorizing felony arrests on probable cause without a warrant remains the law. *United States* v. *Watson*, 423 U.S. 411 (1976). However, police may not make a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest. *Payton* v. *New York*, 445 U.S. 573 (1980). Nevertheless, an unlawful arrest is not a defense to a criminal action. *Frisbie* v. *Collins*, 342 U.S. 519 (1952). The problem in most cases involving an illegal arrest, as is the problem in the present case, is that any search conducted incident to an unlawful arrest is invalidated, thus rendering inadmissible any evidence seized pursuant to the search. The same problems therefore, associated with unlawful searches and seizures are also relevant to arrests made on less than sufficient probable cause. Although a defendant may be guilty, the evidence that proves that fact cannot be used if he was arrested before a police officer's suspicions have hardened into probable cause.

The exclusionary rule is a crude, heavy-handed sanction of doubtful effectiveness. Although there is no doubt that there is a necessity for some sanction, it is now time to explore alternatives to the exclusionary rule.

Chief Justice Burger has suggested that "Congress should develop an administrative or quasi-judicial remedy against the government itself to afford compensation and restitution for persons whose Fourth Amendment rights have been violated." *Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 422 (1971) (Burger, C.J., dissenting). The exclusionary rule is an impairment to the search for truth; it vastly overreaches its function as a disciplinary measure for police officers. A comparison between our system, with its exclusionary rule, and that of Great Britain, which does not have such a rule, fails to reveal in the British system any of the abuses warned against by proponents of the rule. "Abuse of power by the police is not thought to be a problem in England and . . . The reputation for excellent police work which the British have established and which others envy seem to the foreign observer to be well justified." E. Friesen & I. Scott, *English Criminal Justice: An Introduction for American Readers* 63-64 (1977) The English procedure consists of rigorous investigation of all complaints against the police, no matter how petty. E. Frien & I. Scott, *supra*, at 63. Confessions are evaluated merely on the basis of voluntariness; if voluntary they are admitted, otherwise they are excluded. The Royal Commission on Criminal Procedure, *Part II of the Written Evidence of the Commissioner of Police of the Metropolis* 145 (1978) [hereinafter cited as Royal Commission]. The standard of voluntariness is admittedly more stringent than the American standard, as evidenced in the case of *R. V. Partridge* [1836] 7 C. & P. 551, where in the statement "I should be obliged to you if you would tell us what you know about it; if you will not, of course, we can do nothing," was held to render a confession involuntary. However, evidence discovered as a result of an involuntary confession is admissible, since the involuntariness of a confession only goes to its reliabiilty. Royal Commission, *supra*, at 148.

To summarize, given the history of the development and application of the exclusionary rule as applied to the states, and its obvious failure to accomplish its stated purpose of deterring unlawful police conduct, we are simply not willing to extend the rule any further than is necessary to comply with decisions of the United States Supreme Court. Therefore, the decision of the Court of Criminal Appeals is reversed, and we remand this case to that court so that the verdict of the trial jury may be reinstated.

REVERSED AND REMANDED.

Maddox, Almon, Shores, and Beatty, JJ., concur.

Faulkner, Jones, and Embry, JJ., would quash the writ and, therefore, dissent.

Adams, J., (not sitting).

OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

April 10, 1981

Re: 79-732

Ex. Parte: State of Alabama, Ex Rel. Attorney General

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS

(Re: Omar Taylor, Appellant vs. State of Alabama, Appellee)

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

———Appeal docketed. Future correspondence should refer to the above number.

———Court Reporter granted additional time to file reporter's transcript to and including

———Clerk/Register granted additional time to file clerk's record/record on appeal to and including

———Appell——— granted 7 additional days to file briefs to and including

———Appellant(s) granted 7 additional days to file reply briefs to and including

———Record on Appead filed

———Appendix Filed

———Submitted on Briefs

———Petition for Writ of Certiorari denied. No opinion.

xxxxx Application for rehearing overruled. No opinion written on rehearing.

———Permission to file amicus curiae briefs granted

———

4-10-81

/s/ J. O. Sentell
Clerk, Supreme Court of
Alabama

SUPREME COURT OF THE UNITED STATES

No. 81-5152

OMAR TAYLOR, PETITIONER

v.

ALABAMA

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF ALABAMA

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

November 2, 1981

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 359956 746

Office-Supreme Court, U.S.
FILED
AUG 28 1981
ALEXANDER L. STEVAS,
CLERK

81-5152

NO. 81-5152

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1981

OMAR TAYLOR,

PETITIONER,

VS.

STATE OF ALABAMA,

RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

BRIEF FOR RESPONDENT STATE OF ALABAMA IN OPPOSITION TO PETITION FOR CERTIORARI

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THOMAS R. ALLISON
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QUESTIONS PRESENTED

1. Whether a petition not timely filed should be reviewed absent any request for extension or any good cause shown for failure to comply with rules.

2. Whether the question of fingerprint comparison is within the jurisdiction of the Supreme Court where this issue was not the subject of the opinion of the Alabama appellate court and was not expressly reviewed by the highest court of the State.

3. Whether the Alabama Supreme Court properly found the petitioner's confession was admissible in light of Dunaway.

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NO. 81-5152

IN THE

SUPREME COURT OF THE UNITED STATES

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PETITIONER,

VS.

STATE OF ALABAMA,

RESPONDENT.

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BRIEF FOR RESPONDENT STATE OF ALABAMA IN OPPOSITION TO PETITION FOR CERTIORARI

OPINIONS BELOW

The opinion of the Alabama Court of Criminal Appeals appears in petitioner's Appendix as "A". The opinion of the Supreme Court of Alabama appears in petitioner's Appendix as "B". The opinions of the Alabama Courts can be found

in the reporter as Taylor v. State, 399 So. 2d 875 and 881 (1981).

JURISDICTION

Petitioner asserts that this Court has jurisdiction under 28 U.S.C. §1257 (3), and has presented two issues for review. It is respondent's position that this Court is without jurisdiction to consider issue number one (finger-prints) since this issue was not addressed in the opinion of the Court of Criminal Appeals and was not expressly passed on by the Alabama Supreme Court.

STATEMENT OF THE CASE

Respondent adopts the Statement of the Case as set forth in the Opinion of the Alabama Supreme Court and the Court of Criminal Appeals.

REASONS FOR DENIAL OF THE WRIT

1. THE PETITION WAS NOT TIMELY FILED AND ABSENT ANY REQUEST FOR EXTENSION OR ANY GOOD CAUSE SHOWN, PETITION SHOULD BE DENIED.

The petitioner in this case has been represented by the same counsel through the trial, through the Alabama appellate courts, and before this Court. The Supreme Court of Alabama denied the application for rehearing on April 10, 1980, and the petition for a writ of certiorari was filed before this Court on July 27, 1981, 107 days later.

Respondent recognizes that the procedural rules, such as Rule 20, are not jurisdictional and can be relaxed by the court. Sanabria v. United States, 437 U. S. 54, 57 L. Ed. 2d 43, 98 S. Ct. 2170 (1978). In Sanbria, supra, the petition was filed one day out of time and

the petitioner had filed a motion, supported by affidavits.

In discussing Rules of the Supreme Court, Rule 22(2) (now Rule 20), Mr. Justice Harlan in Schacht v. United States, 398 U.S. 58, 26 L. Ed. 2d 44, 90 S. Ct. 1555 (1970) stated:

> "Although I therefore conclude that this Court possesses the discretion to waive the time requirements of Rule
> [398 US 69]
> 22(2), it must be recognized that such requirements are essential to an orderly appellate process. Consequently, I believe our discretion must be exercised sparingly, and only when an adequate reason exists to excuse noncompliance with our Rules. In the present case, I agree with the Court that petitioner has adequately explained why he failed to meet our time requirements."

In this instant case the writ should be denied as the petition was filed 47 days late, there was no

request for any extension of time, and there was no good cause shown for the delay.

2. THE QUESTION OF THE ADMISSIBILITY OF FINGER-PRINT COMPARISON EVIDENCE WAS NOT ADDRESSED BY THE COURT OF APPEALS AND WAS NOT EXPRESSLY REVIEW-ED BY THE ALABAMA SUPREME COURT.

The one issue reviewed by the Alabama Court of Criminal Appeals was stated in their opinion (Petitioner's Appendix "A" page 2) as:

> "Appellant filed a pretrial motion seeking to have his confession suppressed and his arrest declared illegal. A full blown hearing was held on this motion and much testimony was taken. At the conclusion of the hearing the motion to suppress was overruled and denied."

The appellate court considered the admissibility of the confession only and reversed the case in light of Dunaway

v. New York, 442 U.S. 200, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979).

Although the Supreme Court of Alabama referred to the issue under review as involving fingerprints and confession the Supreme Court did nothing more than review the opinion of the appellate court, reverse the decision involving the confession in light of Dunaway, and set forth a discussion of the harshness of the exclusionary rule.

Where the issue of the admissibility of the fingerprint comparison was not addressed by the appellate court and not expressly reviewed by the State Supreme Court, a jurisdictional question is raised. In Street v. New York, 394 U.S. 576, 22 L. Ed. 2d 572, 89 S. Ct. 1354 (1969) it was held that where a question is not presented to the State courts in such a manner that it is

decided by the highest court of the State when it affirms the conviction, then the Supreme Court has no power to consider the matter.

3. THE ALABAMA SUPREME COURT PROPERLY FOUND THE DEFENDANT'S CONFESSION ADMISSIBLE IN LIGHT OF DUNAWAY.

The Alabama Court of Criminal Appeals considered the one issue of the admissibility of the defendant's voluntary confession based upon circumstances comprising less than probable cause and reversed the trial court's conviction in light of Dunaway.

The Alabama Supreme Court properly reversed the Court of Criminal Appeals on the basis that the taint of an illegal arrest had been attenuated by the following factors as set forth in Dunaway:

1. The temporal proximity of the arrest and the confession. In Dunaway there was less than two hours between the arrest and the confession. In Taylor v. State, 399 So. 2d 881 (1981), more than six hours had lapsed between the arrest and the confession and the defendant had been advised of his Miranda rights on three occasions.

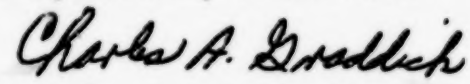
2. The presence of intervening circumstances. In Dunaway there were no intervening circumstances. In Taylor the defendant was placed in a lineup where the victims were unable to identify him, an arrest warrant was obtained on the basis of fingerprint comparisons, the defendant was advised of his rights on three occasions, and he had a private conversation with his girlfriend and a male comparison all prior to his confession.

3. The purpose and flagrancy of the official misconduct. In Dunaway the defendant's arrest was purely investigatory and the officers maintained the defendant was merely "detained." In Taylor the investigation was focused on one person, Omar Taylor. Officers advised Taylor upon taking him into custody that he was under arrest for the robbery of Moseley's Grocery. Officer's had a description of the robber, had a set of latent prints from the crime scene, and had information naming Taylor as the robber. Although the reliability of the informant was not proven, officers had reason to believe the informant's information was accurate as (1) the informant was in jail on pending cases and desperately needed help in exchange for reliable information and (2) the informant was a suspect in the same robbery.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.



/s/ Charles A. Graddick
CHARLES A. GRADDICK
ATTORNEY GENERAL OF
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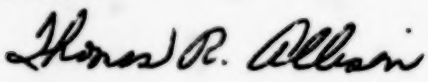

/s/ Thomas R. Allison
THOMAS R. ALLISON
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OF ALABAMA

CERTIFICATE OF SERVICE

I hereby certify that on this the 26th day of August, 1981, I served three copies of the foregoing Brief and Argument in Opposition to Petition for Writ of Certiorari on the Supreme Court of Alabama and the attorney for petitioner by placing same in the United States mail, postage prepaid and properly addressed as follows:

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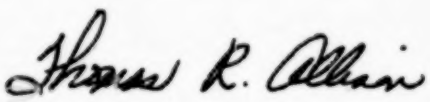

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No. 81-5152

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

OMAR TAYLOR,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

On The Writ Of Certiorari To The Supreme Court of Alabama

PETITIONER'S BRIEF

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QUESTIONS PRESENTED

1. Whether or not confession taken from Petitioner following a warrantless arrest based on less than probable cause and after six hours of intermittent questioning subsequent to the arrest is admissible into evidence in light of Petitioner's rights under the Fourth Amendment of the Constitution of the United States against illegal search and seizure.

2. Whether or not fingerprints taken from Petitioner following a warrantless arrest based on less than probable cause are admissible into evidence in the light of Petitioner's rights under the Fourth Amendment of the Constitution of the United States against illegal search and seizure.

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IN THE

Supreme Court of the United States

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No. 81-5152

OMAR TAYLOR,

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Respondent.

On The Writ Of Certiorari To The Supreme Court of Alabama

PETITIONER'S BRIEF

OPINIONS OF THE COURTS BELOW

1. Judgment and sentence of Trial Court (R. 173)
2. Opinion of the Court of Criminal Appeals (J.A. 25)
3. Opinion of the Supreme Court of Alabama (J.A. 37)

JURISDICTION

The Jurisdiction of this Court is invoked under Title 28 U.S.C. § 1257 (3)

The Supreme Court of Alabama denied rehearing on April 10, 1981, and reinstated the sentence of the Trial Court. Petitioner filed with the Supreme Court of the United States July 27, 1981, and Petition was granted November 2, 1981.

CONSTITUTIONAL PROVISION

1. The Fourth Amendment Provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the places to be searched and persons or things to be searched."

STATEMENT OF THE CASE

1. Petitioner was the subject of a warrantless arrest in reference to a robbery occurring December 2, 1978. The arrest was based on statements made by an alleged robbery and rape suspect awaiting trial in an unrelated crime. Petitioner was arrested, fingerprinted, photographed, placed in a lineup, and questioned. Although there was no identification at the lineup, Petitioner's prints were found to match those found at the scene of the crime on objects held by one of the robbers. Petitioner was confronted with the fingerprints, and questioned until some six hours after the initial arrest a confession was obtained.

2. At all stages of the proceeding, Petitioner objected to and moved for exclusion and suppression of the before mentioned fingerprints and confession. The same being denied.

3. On May 27, 1980, the Court of Criminal Appeals for the State of Alabama reversed.

4. On February 27, 1981, the Supreme Court of Alabama reversed and denied the application for rehearing on April 10, 1981.

5. Appointed Counsel misread or misunderstood the time allowed for filing in the Supreme Court of the United States, but upon realizing that the time period for filing was not jurisdictional and because of the nature of the case and obvious error, filed the Petition on July 27, 1981. On November 2, 1981, the Supreme Court of the United States accepted the writ.

SUMMARY OF ARGUMENT

Petitioner's argument hinges on the Courts holding in Davis v. Mississippi, 394 U.S. 721 (1969), and Dunaway v. New York, 442 U.S. 200 (1979), both of which deal with illegal arrests and the "Fruit of the Poisonous Tree."

Petition alleges clear Fourth Amendment violations in reference to the fingerprints taken shortly after arrest, and the confession which followed six hours after the initial warrantless arrest. Both flow directly from the arrest without circumstances which can be held to attenuate the taint.

Therefore, Petitioner argues that in the absence of any evidence to the contrary his conviction should be reversed.

ARGUMENT

1. Whether or not a confession taken from Petitioner following a warrantless arrest based on less than probable cause and based on six hours of intermittent questioning subsequent to the arrest is admissible into evidence in light of Petitioner's rights under the Fourth Amendment of the Constitution against illegal search and seizure.

This case presents two clear questions of constitutional significance under the Fourth Amendment of the United States. The facts demonstrate clearly that the arrest of Petitioner was without probable cause, in that it was based solely on the uncorroborated statement of a jailed and alleged rape and robbery suspect, one Charles Martin. (R. 5). Martin's source was never developed, nor could he give officer Mobley any information which would give credibility to his statements. An arrest based on mere suspicion will not afford justification for an arrest, unless the information derived from a credible source or person presumed to know the facts which, if submitted to the proper authority, would require issuance of a warrant for arrest. Berry v. State, 27 Ala. App. 501, 175 So. 407 (1937). In the present case there were insufficient facts for issuance of a

warrant. Petitioner submits that the government authorities knew the same, and began the investigation independently and without legal authority. The investigatory exploration was detailed and with specific design. Following the arrest, Petitioner was questioned on at least three occasions, fingerprinted, placed in a lineup, photographed and permitted to converse with acquaintances. The fingerprinting falls clearly within the holding of Davis v. Mississippi, 394 U.S. 721 (1969). The Trial Court recognized the same. (R. 106). Nevertheless, Petitioner remained at the Police Station, under complete and total control of the police until he confessed. (R. 128).

The case is strikingly similar to Dunaway v. New York, 442 U.S. 200 (1979), where a New York Detective questioned an inmate, whose statements implicated Dunaway in an attempted robbery and homicide, and he was subsequently arrested sans a warrant. There the Court Held:

> 1. The Rochester police violated the Fourth Amendment and the Fourteenth Amendment when without probable cause to arrest, they seized Petitioner and transported him to the police station for investigation.
>
> (a) Petitioner was "seized" in the Fourth Amendment sense when he was taken involuntarily to the police station, the State concedes that the police lacked probable cause to arrest him before his incriminating statement during interrogation.

Petitioner in the case at bar submits that the police equipped with prints illegally obtained, secured a warrant which was void ab initio, and continued their design to coerce Petitioner's confession. Again it must be kept in mind the Trial Court ruled those prints illegal. (R. 106). Continuing, the Court in Dunaway stated:

> (b) Terry V. Ohio, 392 U.S. 1, which held that limited "stop and frisk" searches for weapons are so substantially less intrusive than arrests that the general rule requiring probable cause to make Fourth Amendment "sei-

zures" reasonable can be replaced by a test balancing the limited violation of the individual privacy against the opposing interest in crime prevention and detection and in police officer's safety, and the Terry case's progeny, do not support the application of a balancing test so as to hold that "seizures" such as that in this case may be justified by mere "reasonable suspicion." The narrow intrusions in Terry and its progeny were judged by a balancing test rather than the general rule requiring probable cause only because those intrusions fell so far short of the kind of intrusions associated with an arrest. For all but those narrowly defined intrusions, the requisite balancing test has been performed in centuries of precedent and is embodied in the principle that seizures are reasonable only if supported by probable cause.

(c) The treatment of Petitioner, whether or not technically characterized as an arrest, was in important respects indistinguishable from a traditional arrest and must be supported by probable cause. Detention for custodial interrogation — regardless of its label — intrudes so severely on the interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest. Cf. Davis v. Mississippi, 394 U.S. 721; Brown v. Illinois, supra.

It is clear that the Trial Court, while refusing to suppress the confession, did find the arrest illegal by sustaining counsel's objection to the admission of the fingerprints taken subsequent to the arrest, even though it permitted the reprinting of Petitioner at trial. (R. 106). Assuming, arguendo, the arrest to be illegal, does suppression of the confession follow. This brings us to attenuation. It must be asked whether or not the unconstitutional police conduct leading to Petitioner's confession had been sufficiently attenuated so as to make his confession admissible against him at trial. Wong Sun v. United States, 371 U.S. 471 (1963).

Petitioner does not deny Miranda warnings were given. He submits they were continuously given up to receipt of his

confession, and although he explained his understandings of his signature, (R. 46), for the purpose of this argument we will assume the confession voluntary under the Fifth Amendment. Even so, Dunaway v. New York, supra, stands for the proposition:

> (a) Even though the proper Miranda warnings may have been given and Petitioner's statements may have been "voluntary" for purposes of the Fifth Amendment, "[T]he exclusionary rule, . . . when utilized to effectuate the Fourth Amendment, serves interests and policies that are distinct from those it serves under the Fifth." Brown v. Illinois, supra, at 601. While a confession after proper Miranda warnings may be voluntary for Fifth Amendment purposes, this type of "voluntariness" is merely a threshold requirement for the Fourth Amendment analysis.
>
> (b) Under the Fourth Amendment analysis, which focuses on "the causal connection between the illegality and the confession," Brown v. Illinois, supra, at 603, factors to be considered in determining whether the confession is obtained by exploitation of an illegal arrest include: The temporal proximity of the arrest and the confession, the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct. Here, Petitioner was admittedly seized without probable cause in hope that something might turn up, and confessed without any intervening event of significance. Cf. Brown v. Illinois, supra.

Petitioner calls the Court's attention to its comment in Dunaway in reference to the purpose and flagrancy of the official misconduct. At the time of the arrest, there was nothing more than Mr. Martin's statement to go on, but acting without the law and with specific design Petitioner was arrested in hopes that something might turn up, and after the fingerprints were matched the officers began to use them as leverage toward their final goal. (R. 27, 36, 40, 49, 51). In addition to the illegal arrest and fingerprinting, police attempted to have Petitioner identified

through use of a lineup and photographs. Finally, they brought in Petitioner's girlfriend and another man, Charles Williams, known not only to Petitioner, but also to the police. (R. 51, 52, 53).

The interesting thing about Respondent's position is the weight he has put on Petitioner's conversation with Charles Williams and the girl. It is foolish to argue that the police did not have total control of Petitioner and his activities from the moment of his arrest to the time the confession was obtained. Charles Williams may well have been an informant, although that was not developed. The State has no facts to argue attenuation. The facts clearly show the flagrant and abusive conduct of the police in obtaining the confession and request the relief of this most Honorable Court.

II. Whether or not fingerprints taken from Petitioner following a warrantless arrest based on less than probable cause are admissible into evidence in light of Petitioner's rights under the Fourth Amendment of the Constitution against illegal search and seizure.

This issue presents itself because the Trial Court after ruling the prints taken subsequent to the arrest were inadmissible, permitted Petitioner's prints to be made at Trial for consideration by the trier of fact. In ruling to exclude the prints taken subsequent to the arrest, the Trial Court followed the ruling of Davis v. Mississippi, supra, where it was made clear that illegally obtained evidence is admissible at a criminal trial, however relevant and trustworthy the seized evidence may be as an item of proof. Petitioner agrees that any other ruling would open the door to carte blanche intrusions upon the rights of the innocent citizens subjected to involuntary detention on less than probable cause. The holding in Davis, supra, represents the true purpose of the Fourth Amendment.

The Court in Davis, indicated that only under, "narrowly defined circumstances", could such intrusions as found in

Davis be permitted. As in Davis, the government took no such steps in the present case.

Respondent has argued previously that any such intrusion was corrected at trial by taking fresh prints. His argument having been under the ruling of U.S. v. Dionisio, 410 U.S. 1 (1973), that the formerly tainted prints could somehow be purged of illegality. Petitioner would point out that the government in Dionisio may have evidenced one of those narrowly defined circumstances suggested in Davis. The present fact situation is analogous to Silverthrone Lumber Company v. United States, 251 U.S. 385 (1920), when the Court as per Judge Holmes declared:

> "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but it shall not be used at all. Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, but the knowledge gained by the Government's own wrong cannot be used by it in the way proposed.

I point out that the Petitioner had no prior record known to the police, nor evidence of previous prints in existence. (R. 134). Petitioner submits that, but for the discovery of his prints by way of this arrest, the government had no prior knowledge or means of knowing Petitioner's culpability. Petitioner freely admits that had the procedure in Dionisio been used or as used in, In Re The Fingerprinting of M. B., 125 Super 115, 309 A. 2d (1979), his basis for appeal may not have existed. However, in the present case the same was not, and the law is clear in Reading Silverthrone, that the government must act in accordance with the proper procedures as prescribed by law or fail. The 9th Circuit in the U.S. v. Jennings, 468 F. 2d 111 (9th Cir. 1972) clearly represents as does the present case, that prints illegally seized without probable cause cannot be used as evidence at trial, again reference to Davis.

Petitioner suggests the need for exclusion and suppression of the fingerprints, since the method used in the present case are completely without legal authority and must be dismissed from consideration by the trier of fact. Petitioner therefore humbly requests the Court's exclusion of the same.

CONCLUSION

The evidence clearly shows that Petitioner was illegally arrested by the government. The arrest was with specific design and its flagrancy is well documented.

As a result, Petitioner humbly requests of this Court that the confession and prints previously received be hereby excluded as evidence.

Respectfully submitted,

ROBERT M. BENO
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FILED
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CLERK

NO. 81-5152

IN THE

In the Supreme Court of the United States

OCTOBER TERM, 1981

OMAR TAYLOR,

PETITIONER

v.

STATE OF ALABAMA,

RESPONDENT

ON THE WRIT OF CERTIORARI TO THE
SUPREME COURT OF ALABAMA

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

1. Was the evidence of Petitioner's fingerprints and confession admissible under the Fourth Amendment and the rule in *Dunaway v. New York*, 442 U.S. 200 (1979)?

2. If this Court finds the evidence of Petitioner's fingerprints and confession was inadmissible, should this evidence then be admissible under an "objective good-faith belief" exception to the exclusionary rule?

PARTIES

The caption contains the names of all parties to the proceeding in the court below.

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II. IF THIS COURT SHOULD FIND THAT PETITIONER'S FINGERPRINTS AND CONFESSION WERE SUBJECT TO SUPPRESSION UNDER THE RULE IN *DUNAWAY*, SUCH EVIDENCE SHOULD BE ADMISSIBLE AS AN EXCEPTION TO THE EXCLUSIONARY RULE AS THE POLICE ACTED IN AN OBJECTIVE GOOD FAITH BELIEF THAT THEIR CONDUCT WAS PROPER 13

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NO. 81-5152

IN THE

In the Supreme Court of the United States

OCTOBER TERM, 1981

OMAR TAYLOR,

Petitioner

v.

STATE OF ALABAMA,

Respondent

On Writ of Certiorari to the Supreme Court of Alabama

BRIEF OF RESPONDENT

OPINIONS BELOW

1. The opinion of the Alabama Court of Crimina' Appeals is reported as *Taylor v. State*, 399 So. 2d 875 (1981), and is found in the Joint Appendix at page 25.

2. The opinion of the Alabama Supreme Court is reported as *Taylor v. State*, 399 So. 2d 881 (1981), and is found in the Joint Appendix at page 37.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3). It is Respondent's position that this Court is without jurisdiction to consider the admissibility of the fingerprint evidence since this issue was not addressed in

the opinion of the Court of Criminal Appeals and although mentioned was not expressly passed on by the Alabama Supreme Court.

STATEMENT OF THE CASE

On December 2, 1978, Omar Taylor and two accomplices committed an armed robbery of Moseley's Grocery in Montgomery, Alabama. This was one of a series of robberies that had occurred within a short period of time in the same area of Montgomery. When the investigating officers processed the crime scene, they obtained latent fingerprints from a package of weiners and a bag of sugar one of the robbers had placed on the check-out counter just prior to the taking of the money. Also, the police officers had a description of the robber as a black male between twenty and twenty-five years old, about five feet six inches in height and weighing about a hundred and forty-five to a hundred and fifty pounds. (R. 39).

On December 22, 1978, Charles Martin was arrested in a separate case on charges of rape and robbery that had occurred in the same neighborhood. Martin was known to Detective Mobley as a suspect in the robbery of Moseley's Grocery. (J.A. 11). During the following week Mobley talked to Charles Martin on several occasions and developed a rapport with him. (J.A. 10). Martin told Detective Mobley that he knew that Omar Taylor was one of those involved in the robbery of Moseley's Grocery. (R. 15).

Charles Martin desperately needed help and Detective Mobley assured him that his cooperation would be brought to the attention of the court if his information proved reliable. He also impressed upon Martin the consequences of giving untruthful information. (J.A. 10). Mobley had not received any previous information from Martin.

Unable to verify the information and convinced of the accuracy of it, Detective Mobley instructed Detective Alford to arrest Omar Taylor. On January 4, 1979, at about 3:00 p.m. Detectives Alford and Rutland made a warrantless arrest of Taylor at a pool hall. The officers identified themselves and advised Taylor that he was under arrest for

the robbery of Moseley's Grocery.

Detective Alford advised Taylor of his *Miranda* rights but did not interrogate him. (R. 20). Taylor was taken to the jail where he was fingerprinted, photographed, interrogated briefly for about fifteen or twenty minutes and then placed in a cell.

Later, Omar Taylor was taken from his cell and placed in a lineup where Mrs. Moseley was unable to identify him. He was returned to his cell where he remained until after a fingerprint expert compared Taylor's fingerprint card with the latent prints from the crime scene and determined positively that Taylor was one of the three robbers. Taylor was confronted with this evidence, but he denied any knowledge of the robbery when questioned by Detective Wilson. Prior to the interrogation Wilson again advised Taylor of his *Miranda* rights. (R. 33).

The Moseley Grocery robbery was assigned to Detective Hicks. That night he examined the file folder and got Taylor out of his cell to be interrogated. At this time Taylor had been in jail for almost six hours, most of which time had been spent in the solitude of his cell.

Detective Hicks read Taylor his *Miranda* rights. Taylor, a high school graduate, then read the rights form and signed it. (R. 28 and 58). Hicks had been talking to Taylor for five or ten minutes when Taylor's girlfriend and a neighbor, Charles Williams, arrived on the scene. (R. 31). According to the testimony of Detective Hicks, Taylor's girlfriend came to the Detectives and stated she wanted to see him. When Taylor was told she was outside, he wanted to see her and Detective Hicks allowed the girlfriend, the neighbor, and Taylor to confer in private. (R. 35 and 136).

After this conference, Taylor confessed to his participation in the robbery of Moseley's Grocery and identified his two accomplices as Charles Martin, the informant, and Larry Davis. (R. 128).

During the trial Petitioner moved to exclude the evidence of the fingerprint comparison and moved to suppress the confession in light of *Dunaway v. New York*, 442 U.S. 200 (1979). The trial court excluded the fingerprints taken

after Petitioner's arrest. Petitioner was fingerprinted during the trial and those prints were admitted into evidence. During the trial the judge admitted Taylor's confession as he found there were enough factors to distinguish his case from *Dunaway*. (R. 116).

The Court of Criminal Appeals reviewed the trial court's admission of the confession following an arrest based on less than probable cause and on May 27, 1980, reversed and remanded the case in light of *Dunaway*.

On February 27, 1981, the Alabama Supreme Court reversed the appellate court after finding that the taint of an illegal arrest had been attenuated by certain factors. Petitioner's application for rehearing was denied on April 10, 1980, and the petition for a writ of certiorari was filed before the U.S. Supreme Court on July 27, 1981, one hundred and seven days later. The writ was granted on November 2, 1981.

SUMMARY OF THE ARGUMENT

Respondent contends this Court is without jurisdiction to consider the admissibility of the fingerprint evidence. The Alabama Court of Criminal Appeals addressed the one issue of the admissibility of a voluntarily given confession following an arrest based on less than probable cause. The Alabama Supreme Court reviewed the appellate court's decision, and although reference was made to the fingerprints, the admissibility of this evidence was never expressly passed on by the Alabama Supreme Court.

The existance of the sufficiency of probable cause for the arrest presents a close question. The officers had a detailed description of the suspect, a set of latent fingerprints from the crime scene, and information from a jail inmate who desperately needed help in exchange for reliable information and who was known to the officers as one of three suspects in the Moseley Grocery robbery.
Petitioner in his confession later named the informant as one of his accomplices. Although reliability of the informant may not have been adequately developed at the suppression hearing, the officers had reason to believe the

informant was speaking as a participant and eye-witness to the crime. Even if the officers lacked probable cause, they were acting in good faith and their belief had an objective reasonable basis.

If this Court should find that the arrest was based on less than probable cause, when the facts are considered it is evident that the Alabama Supreme Court correctly held Petitioner's confession was admissible in light of *Dunaway v. New York*, 442 U.S. 200 (1979). Under the three factors set forth the taint of his arrest was sufficiently attenuated to permit the admission of the incriminating evidence. The time period between the arrest and confession was six hours, the majority of which was spent in the solitude of his cell where he could compose his thoughts. There were numerous intervening circumstances. The *Miranda* rights were read to him on three occasions. He was placed in a lineup where the victim was unable to identify him. Petitioner spent a lengthy period of time in the solitude of his cell and prior to his confession was permitted to confer in private at his request with his girlfriend and neighbor. There was no flagrant violation of constitutional rights by the police. When arresting the defendant for the robbery, the officers were acting in good faith and there was an objective reasonable basis for such a belief even if the probable cause was technically deficient.

As applied now there is no flexibility within the exclusionary rule regardless of the degree of police error. Honest mistakes on the part of police officers are treated in exactly the same way as flagrant violations of Fourth Amendment rights. This Court should adopt as an exception to the exclusionary rule, the admission of evidence where the police, though mistaken, have an objective good faith belief that their action was proper. There must be an objective, reasonable basis for such a belief. Should the Court find Petitioner's fingerprints and confession evidence otherwise inadmissible, this evidence should be admissible under this exception to the exclusionary rule.

ARGUMENT

I.

EVIDENCE OF THE DEFENDANT'S FINGERPRINTS AND CONFESSION WERE ADMISSIBLE UNDER THE FOURTH AMENDMENT AND THE RULE IN *DUNAWAY v. NEW YORK.*

A. The Question Of The Admissibility Of The Fingerprint Comparison Evidence Was Not Addressed By The Court Of Appeals And Was Not Expressly Reviewed By The Alabama Supreme Court.

The one issue reviewed by the Alabama Court of Criminal Appeals as stated in their opinion (J.A. 25) was:

> "Appellant filed a pre-trial motion seeking to have his confession suppressed and his arrest declared illegal. A full blown hearing was held on this motion and much testimony was taken. At the conclusion of the hearing the motion to suppress was overruled and denied."

The appellate court considered the admissibility of the confession *only* and reversed in light of *Dunaway v. New York*, 442 U.S. 200 (1979) and *Brown v. Illinois*, 442 U.S. 590 (1975).

Although the Alabama Supreme Court referred to the issue under review as involving fingerprints and the confession, the Supreme Court did nothing more than review the opinion of the appellate court, reverse the decision in light of the attenuation factors as set forth in *Dunaway*, and point out the harshness of the exclusionary rule.

Where the issue of the admissibility of the fingerprint comparison was not addressed by the appellate court and not expressly reviewed by the State Supreme Court, a jurisdictional question is raised. In *Street v. New York*, 349 U.S. 576 (1969) it was held that where a question is not presented to the State courts in such a manner that it is decided by the

highest court of the State when it affirms the conviction, then the Supreme Court has no power to consider the matter.

B. The Arrest of Taylor Was Based On Probable Cause Or The Officers Acted In A Good Faith Belief Grounded In Objective Reasonableness.

Code of Alabama 1975, §15-10-3 gives an officer authority to arrest without a warrant when a felony has been committed and the officer has reasonable cause to believe that the person arrested committed it. Probable cause exists where the facts and circumstances within the officers' knowledge, and of which they had reasonably trustworthy information, are sufficient in themselves to warrant a man of reasonable caution to believe that an offense has been committed. *Brinegar v. United States*, 338 U.S. 160, 176 (1949).

In discussing probable cause in *Brinegar* at pages 176-177. Mr. Justice Rutledge stated:

> These long-prevailing standards seek to safeguard citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime. They also seek to give fair leeway for enforcing the law in the community's protection. Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability. The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement. To allow less would be to leave law abiding citizens at the mercy of the officers' whim or caprice.

The robbery of Moseley's Grocery by three men was but one of a series of armed robberies that had occurred within a short period of time in the same area of Montgomery. When the investigating officers processed the crime scene, they obtained latent fingerprints from a package of weiners and a bag of sugar one of the robbers had placed on the check-out counter just prior to the robbery. Also, the police officers had a description of the robber as a black male, between twenty and twenty-five years old, about five feet six inches in height and weighing about a hundred and fifty pounds. (R. 39).

Three weeks after the robbery of Moseley's Grocery Charles Martin was arrested on charges of rape and robbery that had occurred in the same neighborhood. When Taylor confessed, he named Charles Martin as one of his two accomplices in the robbery of Moseley's Grocery. (R. 128). At the time Detective Mobley began to get information from Martin he had not been charged in the Moseley robbery, but was known to Detective Mobley and to other members of the detective division as one of the three suspects in the robbery of Moseley's Grocery. (J.A. 11).

During the week following Charles Martin's arrest Detective Mobley talked to him on several occasions. Martin told the officer that Omar Taylor was one of those involved in the robbery of Moseley's Grocery. (R. 25). He did not tell Mobley how he knew of Taylor's involvement.

Since the probable cause to arrest Taylor was based primarily on the statement of an informant it is necessary to consider the facts in light of *Aguilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 393 U.S. 410 (1969). The finding of reasonableness or of probable cause necessarily rest on the facts and circumstances of each particular case.

In considering the reliability of the informant it must be noted that this was the first time Charles Martin had given Detective Mobley information. However, there was a genuine basis for belief that the informant, an accomplice to the same crime, was telling the truth. The informant desperately wanted help and had been told by Mobley that

the trial judge would be made aware of his help if his information cleared a case and that the judge could consider this if he so desired. (R. 15). Mobley talked to Martin several times during the week and developed a rapport with him. He impressed upon Martin the adverse consequences of telling a falsehood and impressed upon him the importance of telling the truth. (J.A. 11).

When considering the second prong of *Aguilar*, it is true that the informant never told the officers how he knew that Taylor was one of the three robbers. Here the informant was an accomplice in the Moseley Grocery robbery. Martin was in jail on a different charge, but he was known as a suspect in the same robbery. By knowing Martin as a suspect in the same robbery, the officer could consider the information more than a casual rumor circulating in the underworld. The logical inference from this knowledge was that Charles Martin was speaking as a witness to and as a participant in the crime.

Officer Mobley was convinced of the truthfulness of the information and instructed Detective Alford to arrest Omar Taylor. Alford took Taylor into custody and advised him that he was under arrest for the robbery of Moseley's Grocery. A court may evaluate the knowledge of all officers collectively in assessing police justification for an arrest. *Robinson v. State*, Ala. Cr. App., 361 So. 2d 379, 382 (1978).

Even if the officers arrested Taylor on less than probable cause they acted in a good faith belief that their action was constitutional and such a belief had an objective reasonable basis.

Should the Court find that Taylor was arrested on less than probable cause, the fingerprint evidence and the confession should be admitted into evidence as an exception to the exclusionary rule as set forth in issue two.

C. The Alabama Supreme Court Properly Held Taylor's Confession Was Admissible In Light Of *Dunaway*.

Assuming, arguendo, that this Court determines Taylor's arrest was based on less than probable cause, the

the defendant's confession would be admissible since the taint of his detention was sufficiently attenuated to permit the admission of the incriminating evidence.

The Alabama Court of Criminal Appeals noted that the Appellant did not question the voluntariness of his confession and reviewed the one issue of the admission of the confession in light of *Dunaway v. New York*, 442 U.S. 200 (1979) (J.A. 29). The appellate court found the fact situation to be a virtual replica of *Dunaway* and *Brown v. Illinois*, 422 U.S. 590 (1975) and found the confession inadmissible.

The Alabama Supreme Court reviewed the opinion of the Court of Appeals and reversed the decision upon a finding that any taint of an illegal arrest had been sufficiently attenuated. When the three factors as set forth in *Brown* and *Dunaway* are considered it can readily be seen that the Supreme Court of Alabama ruled correctly.

1. The temporal proximity of the arrest and confession.

In both *Dunaway* and *Brown* the defendant had confessed in less than two hours after his arrest. In the instant case six hours had lapsed and the defendant had been advised of his *Miranda* rights on three occasions. During the afternoon after his 3:00 p.m. arrest Taylor was fingerprinted, processed, and interrogated for about fifteen or twenty minutes. (J.A. 12). He was placed in a lineup shortly thereafter where Mrs. Moseley was unable to positively identify him. After positive identification was made through a comparison of the latent prints and the fingerprint card, Detective Wilson again advised Taylor of his *Miranda* rights and interrogated him. (J.A. 13 and R. 33). The length of this session is not shown in the record. The case was assigned to Detective Hicks and that night he took Taylor out of his cell, read him his *Miranda* rights and had been interrogating him for five or ten minutes when his girlfriend and neighbor appeared and requested to see him. (R. 37).

The exact amount of time that Taylor spent alone in his cell cannot be determined from the record. However, the

majority of the six hour period was spent in the solitude of his cell. The extended period of time is important, for unlike the situation in *Brown* and *Dunaway* where the defendants had confessed before the shock of the arrest had worn off, Taylor had every opportunity to consider his situation, to organize his thoughts, to contemplate his constitutional rights, and to exercise his free will.

2. The presence of intervening circumstances.

In both *Dunaway* and *Brown* there were no intervening circumstances. Prior to confessing the defendant had been read his *Miranda* rights on three different occasions. He had spent several hours alone in the solitude of his cell where he could collect his thoughts. Prior to the confession an independent magistrate had issued an arrest warrant. Taylor had been placed in a lineup and Mrs. Moseley had been unable to identify him. It would certainly be a confidence builder for a person who had committed an armed robbery to face his victim and find that the victim was unable to identify him. Such an event would tend to lessen the shock of his arrest.

The Alabama Supreme Court properly emphasized the private meeting between Taylor, his girlfriend, and Charles Williams, a friend and neighbor. The police officers had nothing to do with Omar Taylor's choice of friends. The meeting was initiated by his girlfriend, who appeared on the scene with Taylor's friend and neighbor, Charles Williams. (R. 133). During the suppression hearing Detective Hicks explained on cross-examination what happened as follows: (R. 35).

"Q. At that point, you indicated to him that we have your girlfriend outside and we would like her to talk to you about it?
A. No, sir, we did not.
Q. Tell us what happened.
A. His girlfriend came to us and said she wanted to talk to Omar, and we told Omar she was outside

and he wanted to talk to her. And at that time, we let him talk to her."

There was a conflict between the testimony of Taylor and Detective Hicks relating to the circumstances surrounding the meeting between Taylor and his friends. Such a conflict in testimony must be resolved by the trial judge. *McBryar v. State*, Ala. Cr. App., 368 So. 2d 568 (1979). Here the conflict in testimony was resolved in favor of the State.

According to the testimony of Detective Hicks, Taylor was being interrogated in a detective's office when Taylor's girlfriend and Charles Williams arrived in the hall. (R. 133). Hicks describes what happened in his testimony as follows: (R. 136).

Q. Now, who first mentioned the prospect of Omar Taylor seeing his girlfriend?
A. His girlfriend did.
Q. Did he say anything to you about that?
A. I told him that his girlfriend was outside, and he said he would like to talk to her.
Q. And you permitted that?
A. Yes, sir.
Q. Were they permitted to speak privately?
A. Yes, they were.
Q. Whereabouts?
A. In the detective office.
Q. Was any other police officer in there with them?
A. No, sir.

3. The purpose and flagrancy of the official misconduct.

The conduct of the police differs greatly from the action of the police in *Dunaway*, *Brown*, and *Davis v. Mississippi*, 394 U.S. 721 (1969). In *Davis* the only description the officers had of the rapist was that he was a Negro youth. The officers then in a dragnet operation picked up, fingerprinted, and interrogated twenty-four Negro youths in an absence of probable cause. In *Brown* the defendant was identified only as an acquaintance of the victim, not as a

suspect. The officers broke into his apartment, searched it and then arrested the defendant without probable cause and arrested Brown in such a manner that was calculated to cause surprise, fright, and confusion. In *Dunaway* the arrest of a teenager was purely investigatory and the officers maintained Dunaway had not been arrested but merely detained. He was never told he was under arrest. The lead was supplied by a jail inmate who was not shown to be connected to the crime in any manner.

In the instant case the information was obtained from Charles Martin, whom Omar Taylor later identified in his statement as one of his accomplices. (R. 128). At the time Martin talked to the officers, he was known to them as a suspect in the Moseley Grocery robbery. Even though the reliability of the informant might not have been established, the police officers had good reason to believe that he was speaking as a participant in the robbery. Also, the officers knew that Martin desperately wanted help in exchange for reliable information. They had information, a detailed description of the robber, and a set of latent prints from the crime scene. Unlike the situation in *Brown*, *Davis*, and *Dunaway* the investigation focused on one individual who was arrested in the middle of the afternoon at a public place and who was immediately told that he was under arrest for the crime for which he was convicted. The action of the police in the instant case cannot be termed a flagrant disregard for constitutional rights. Even though the sum total of probable cause might not meet the technical standard of probable cause, the police acted with a good faith belief that they were acting within the law and there was an objective reasonable basis for such a belief.

II.

IF THIS COURT SHOULD FIND THAT PETITIONER'S FINGERPRINTS AND CONFESSION WERE SUBJECT TO SUPPRESSION UNDER THE RULE IN *DUNAWAY*, SUCH EVIDENCE SHOULD BE ADMISSIBLE AS AN

EXCEPTION TO THE EXCLUSIONARY RULE AS THE POLICE ACTED IN AN OBJECTIVE GOOD-FAITH BELIEF THAT THEIR CONDUCT WAS PROPER.

If this Court should find that Petitioner's fingerprints and confession evidence was otherwise inadmissible, it should be admissible as the police acted in an objective good-faith belief that their conduct was proper and such belief was grounded in an objective reasonableness. For the reasons set forth in this brief, set forth in the opinion of the Alabama Supreme Court, and set forth in the brief of Amici Curiae in support of Respondent's position, Respondent asks this Court to modify the exclusionary rule to include an objective good-faith exception as set forth in *United States v. Williams*, 622 F. 2d 830 (5th Cir. 1980).

In *Williams* the rule was stated by the Fifth Circuit Court of Appeals sitting *en banc* as:

> "Henceforth in this circuit, when evidence is sought to be excluded because of police conduct leading to its discovery, it will be open to the proponent of the evidence to urge that the conduct in question, if mistaken or unauthorized, was yet taken in a reasonable good-faith belief that it was proper. If the court so finds, it shall not apply the exclusionary rule to the evidence." 622 F. 2d 830, 846-847.

As enumerated in *Williams* at page 841, there are two basic types of good faith violations where the officers fail to meet the requirement of probable cause. The first type is characterized as a "good-faith mistake" where the officers make a judgmental error concerning the existence of facts sufficient to constitute probable cause. The instant case could fit within this category. If Omar Taylor was arrested on less than probable cause, the officers did nothing more than make a good-faith mistake, for their belief was grounded on objective reasonableness.

The other type of good-faith violation was termed as "technical violation" and applied to instances "where an officer may rely upon a statute which is later ruled unconstitutional, a warrant which is later invalidated, or a court

precedent which is later overruled." *Williams*, supra. The officer in *Williams* acted in good-faith belief that he had authority to arrest the defendant in accordance with a valid statute which was later construed differently.

In the previous decisions of this Court there has already been a recognition of the principle of good-faith reliance in the "technical violation" facet of the good faith exception. In *United States v. Peltier*, 422 U.S. 531, (1975), this Court admitted evidence seized in a good faith-border search under a statutory construction that was subsequently held unconstitutional. This Court refused to apply newly announced doctrines of search and seizure law retroactively and stated:

> The teaching of these retroactivity cases is that if the law enforcement officers reasonably believed in good faith that evidence they had seized was admissible at trial, the "imperative of judicial integrity" is not offended by the introduction into evidence of that material even if decisions subsequent to the search or seizure have broadened the exclusionary rule to encompass evidence seized in that manner. *Peltier*, supra, at 537.

Also, in *Michigan v. DeFillippo*, 433 U.S. 31 (1979) this Court admitted evidence seized in a good-faith warrantless arrest based on probable cause for violation of a law later declared unconstitutional. A search of the defendant's person made incident to the arrest resulted in the seizure of drugs. This Court held that DeFillippo's arrest made in a good-faith reliance on a Detroit ordinance, though later declared unconstitutional, was valid regardless of the subsequent judicial determination of its unconstitutionality.

In *United States v. Janis*, 428 U.S. 433, 434, 454 (1976) this Court answered the following question in the negative "Is evidence seized by a state criminal law enforcement officer *in good faith, but nonetheless unconstitutionally*, inadmissible in a civil proceeding by or against the United States?" (Emphasis Respondent's). This Court found that exclusion of the evidence unlawfully seized was not "shown

to have a sufficient likelihood of deterring the state police so that it outweighs the societal costs imposed by the exclusion."

Where official police action is pursued in complete good faith the deterrence rationale loses much of its force. *Michigan v. Tucker*, 417 U.S. 433, 447 (1974).

The good-faith exception to the exclusionary rule as set forth by the Court in *Williams* is limited in scope. The belief of the officer must be more than a subjective belief. His good-faith belief must be grounded in an objective reasonableness. "It must therefore be based upon articulable premises sufficient to cause a reasonable, and reasonably trained officer to believe that he was acting lawfully." *Williams*, at page 841.

In evaluating the justification for the adoption of a good-faith exception to the exclusionary rule, it is not necessary to trace the history of this rule. A comprehensive history of and discussion of the rule is found in the opinion of the Alabama Supreme Court (J.A. 37). *Taylor v. State*, 399 So. 2d 881 (Ala. 1981).

In *Weeks v. United States*, 232 U.S. 383 (1914) it was held that evidence seized by federal agents in violation of the Fourth amendment was inadmissible in federal court. Forty-seven years later the exclusionary rule was applied to the states in *Mapp v. Ohio*, 367 U.S. 643 (1961).

The exclusionary rule was defined in *United States v. Calandra*, 414 U.S. 338, 347, (1974), as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." The exclusionary rule is not in itself a requirement of the Constitution, but is a judicially created means of effectuating the rights secured by the Fourth Amendment. *Stone v. Powell*, 428 U.S. 465, 482 (1976).

The primary justification for the exclusionary rule is the need for deterrence of illegal police conduct. *Stone v. Powell*, at 486; *Calandra*, at 347.

In *Calandra* this Court further stated:

"Despite its broad deterrent purpose, the exclusion-

> ary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons. As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficiously served." 414 U.S. 338, 348.

The same authority that empowered this Court to supplement the Fourth Amendment with the exclusionary rule a hundred and twenty-five years after its adoption allows this Court authority to modify this judicially created remedy. Through the adoption of the objective good-faith exception to the exclusionary rule some of the harshness and injustice of the rule could be removed.

A valid criticism of the rule has been that honest mistakes by police officers are treated in the same way as deliberate flagrant violations of the Fourth Amendment. As applied now the rule is "a mechanically inflexible response to widely varying degrees of police error. . . ." *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 418 (1971) (Burger, C.J., dissenting). The opinion of the Alabama Supreme Court reflected this same criticism by stating: (J.A. 49) *Taylor v. State*, 399 So. 2d 881 (Ala. 1981):

> Furthermore, the exclusionary rule "fails to discriminate between the degrees of culpability of the officer or the degree of harm to the victim of the illegal search and seizure." Wilkey, "The Exclusionary Rule: Why Suppress Valid Evidence?" 62 Judicature 214, 225-26 (1978). Regardless of whether there is a mere technical violation, such as a defective warrant, or a gross violation of the fourth amendment, such as was seen in *Mapp v. Ohio*, 367 U.S. 643 (1961), the penalty is the same; the evidence is excluded. Wilkey, supra, at 226.

Exclusion of evidence seized without any probable cause in a flagrant disregard for the Fourth Amendment is an entirely different question from the suppression of evidence seized in an objective good-faith belief that probable

cause exists, and such belief is grounded on objective reasonabliness. Society has paid a high price for the exclusionary rule. Some of the harshness and injustice of this rule could be mitigated by recognizing the extremes of police misconduct.

This idea was expressed recently in the Attorney General's Task Force On Violent Crime as follows:

> We believe that any remedy for the violation of a constitutional right should be proportional to the magnitude of the violation. In general, evidence should not be excluded from a criminal proceeding if it has been obtained by an officer acting in the reasonable, good faith belief that it was in conformity to the Fourth Amendment to the Constitution.

Attorney General's Task Force on Violent Crime, 29 C.r.L. 3131, 3134 (1981).

Valid criticisms of the exclusionary rule can readilty be illustrated by Omar Taylor's case. In reversing the conviction of the trial court, the Alabama Court of Criminal Appeals stated: (J.A. 34-35) *Taylor v. State*, 399 So. 2d 875 (Ala. App. 1981):

> We are loath to reverse a case where the guilt of the accused is so clear and convincing and the guilt drips from the fingers of both hands, but our path is lighted in *Dunaway* and we are bound to follow this path.

So often the result of the exclusionary rule has been to suppress the truth and set the criminal free. The question as to why the criminal should go free when the constable has blundered has been asked many times, but it has never been satisfactorily answered. When the general public sees armed robbers, rapists, drug pushers, murderers, and all manner of criminals escape punishment on what the public terms "a technicality", society loses respect for the judicial system.

In his dissent in *Kaufman v. United States*, 394 U.S. 217, 237 (1969) Mr. Justice Black stated:

> A claim of illegal search and seizure under the Fourth Amendment is crucially different from many other constitutional rights; ordinarily the evidence seized can in no way have been rendered untrustworthy by the means of its seizure and indeed often this evidence alone establishes beyond virtually any shadow of a doubt that the defendant is guilty.

Taylor's case clearly illustrates the suppression of the truth. One of the two evidentiary items sought to be excluded in Omar Taylor's case was his fingerprint comparison. Fingerprinting is inherently more reliable than eyewitness identification. In suppressing the truth the courts lose sight of what should be the ultimate question — the guilt or innocence of the defendant. The truth is suppressed and the guilty go free regardless of whether there is an objective good-faith mistake or a flagrant violation of constitutional rights by the officer. In *Stone v. Powell*, 428 U.S. 465, 490 this Court stated:

> Application of the rule thus deflects the truth-finding process and often frees the guilty. The disparity in particular cases between the error committed by the police officer and the windfall afforded a guilty defendant by application of the rule is contrary to the idea of proportionality that is essential to the concept of justice.

Police officers are not attorneys. These public servants have taken an oath to uphold the law and protect society. In the reality of every-day law enforcement they will make mistakes. Their action is often termed a "mistake" by a 5 to 4 margin by judges skilled in legal knowledge. One court may find their action within the law and a reviewing court reach the oppositive conclusion.

The mistakes made by the law enforcement officers, however, vary from good-faith mistakes to flagrant violations of constitutional rights. Where the officers have acted in complete good faith the deterrence rationale loses much

of its force, and this is the primary justification for the exclusionary rule. An officer cannot be deterred when he believes in good faith that his action is correct.

The Fifth Circuit Court of Appeals sitting *en banc* in *United States v. Williams*, 622 F. 2d 830, 842 cited Judge Clark's dissent to the panel opinion as it set forth so clearly the relationship between the deterrence rationale of the exclusionary rule and an objective good-faith mistake on the part of an officer. Judge Clark stated:

> No proper deterrent effect is accomplished by the suppression of the evidence in this case. Field officers are seldom trained as legal technicians. Even those who are may have mistakenly thought that Officer Markonni's arrest was proper. Since the officer whose future actions are to be affected will not realize his actions are wrongful when he is compelled to make a quick decision in an apparently valid arrest situation which complicated legal analysis may later establish to be invalid, we cannot expect him to be deterred. If today's ruling does serve as any sort of deterrent, it may have the deleterious effect of making the officer on the line overcautious to act in a situation where proper and reasonable instinct tells him that the activity he observes is criminal. If he hesitates to act lest he later be criticized for denying to the process of justice evidence of crime, we have hindered, not furthered, the interests of justice. Unless an officer knows or should know his activities transgress the bounds of law, the evidence discovered by such activity ought not be suppressed.

Those who would oppose the adoption of an objective good-faith exception to the exclusionary rule would argue that such would constitute an erosion of constitutional rights. Such an argument is without merit as the rule is judicially created and does not co-exist with the Fourth Amendment. Also, the underlying purpose would remain — to deter bad-faith police conduct that could be termed flagrant violations.

Society has paid too high a price for the exclusionary rule. If the rule must be applied then in the interest of justice, it should be made flexible and take into consideration the degree of mistake the officer has made and weigh this against the windfall afforded a guilty defendant.

CONCLUSION

For the reasons set forth in this brief, in the opinion of the Alabama Supreme Court, and in the brief of Amici Curiae in support of Respondent, if this Court should otherwise find the evidence in this case inadmissible under the exclusionary rule, this Court should find that evidence admissible as an objective good-faith exception to the exclusionary rule.

Respectfully submitted,

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No. 81-5152

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

OMAR TAYLOR, *Petitioner*,

v.

STATE OF ALABAMA *Respondent*.

On the Writ of Certiorari To
The Supreme Court of Alabama

PETITIONER'S REPLY BRIEF

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ARGUMENT

1. Respondent's Statement Of The Case Finds No Support In The Record

There are three incidents which are of crucial significance to the proper resolution of the issues in this case: (1) the treatment of the informant's tip; (2) the events which occurred at the police station after Petitioner's arrest; and (3) the Petitioner's meeting with his girlfriend. Respondent's Statement of the Case is a selective description of these events and is replete with conclusory statements which are not supported by the record. The record in this case unmistakably demonstrates an arrest without probable cause and a subsequent confession obtained through exploitation of that illegal arrest. Now, approximately four years after the events at issue, Respondent attempts to paint a constitutional gloss on police conduct which clearly fails to measure up to well-established Fourth Amendment standards.

Respondent's factual description of Detective Mobley's handling of the informant's tip simply is not supported by the record. Respondent asserts that Detective Mobley was "unable to verify the information [received from the informant, Charles Martin]." Brief for Respondent at 2. Respondent provides no citation to the record to support this assertion. In fact, the record clearly reveals that Detective Mobley made no attempt whatsoever to verify the tip proved by Martin,[1] in spite of the fact that there was time available to utilize many alternative and constitutional police investigative techniques rather than the illegal arrest of Petitioner.

Respondent also states that after Petitioner was arrested he spent most of the next six hours "in the solitude of his cell." Brief for Respondent at 2. Again, this factual statement has no support in the record. To be sure, the record gives no precise time as to the sequence of events at the police station. However,

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[1] *See* App. at 8-10.

the record clearly indicates that in the approximately six hours at the police station Petitioner was subject to at least three separate interrogations, a lineup, fingerprinting, and finally met with his emotionally distraught girlfriend after the police had interrogated Petitioner in her presence. This constant shuffling of Petitioner from his cell, clear on the face of the record, hardly squares with Respondent's claim that Petitioner spent most of the six hours "in the solitude of his cell."

Finally, Respondent's description of the meeting between Petitioner and his girlfriend and neighbor only tells part of the story. Respondent asserts that Petitioner and his girlfriend were allowed to meet in private. This, of course, completely ignores Petitioner's uncontroverted testimony that this private meeting occurred only after the police had interrogated Petitioner in his girlfriend's presence and only after the police enlisted his girlfriend to urge Petitioner to confess.

II. There Was No Probable Cause to Arrest Petitioner And Respondent Has Never Contended To The Contrary

Contrary to assertions made at trial, Respondent now contends that the police has probable cause to arrest Petitioner.[2] Respondent points to three pieces of information known to the police at the time of the arrest, which it contends, provides probable cause to arrest Petitioner: (1) the fingerprints found at the grocery store; (2) a description of the suspect; and (3) the tip

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[2] At trial the prosecution conceded that there was no probable cause but instead argued that the detention for investigation could be based on less than probable cause.

> Mr. Bentley [prosecutor] — Now, it is my position that while the information that . . . Martin gave to Detective Mobley might not amount to probable cause. . . .
>
> . . .
>
> [I]t is not my position that Charles Martin['s tip] gave this Detective information which amounted to probable cause.

App. at 4-5

provided by the informant, Charles Martin. A review of these three grounds demonstrates their inadequacy to support even a colorable claim that probable cause existed to arrest Petitioner.

Respondent fails to explain how the possession of a set of fingerprints, which prior to the arrest had in no way been connected to the Petitioner, could support a finding of probable cause to arrest Petitioner. In relying on the fingerprints, Respondent chooses to ignore the fundamental question in each case involving probable cause — is there a reasonable basis to believe that the particular individual arrested committed the crime? See *Henry* v. *United States*, 361 U.S. 98, 102 (1959); *Brinegar* v. *United States*, 338 U.S. 160, 175-76 (1949). the unidentified fingerprints in no way provide a link between the robbery and Petitioner and therefore are irrelevant in any determination of probable cause.

Respondent also relies on the fact that the police had a description of the robber as a black male, between twenty and twenty-five years old, about five feet six inches in height, and weighing about one hundred and fifty pounds. This description could not support any claim by Respondent that probable cause existed. The description was so general that it may well have implicated hundreds or even thousands of individuals in the Montgomery area. [3] Moreover, Respondent again ignores the crucial question of whether this information — the description — linked Petitioner to the crime. Respondent provides no citation to the record that indicates that Petitioner matched the description nor any indication that the arresting officers were aware of or relief upon this information when arresting Petitioner. See *Carroll* v. *United States*, 267 U.S. 132, 162 (1925) (facts within knowledge of officer supporting finding of probable cause). Therefore, this Court cannot even determine

[3] *Compare Draper* v. *United States*, 358 U.S. 307, 309 & n. 2 (1959) (description of Defendant included clothing he wore and luggage he carried).

whether the description could have provided any justifiable basis for Petitioner's arrest.

Finally, Respondent relies on the uncorroborated tip provided by the informant, Charles Martin, that ties Petitioner to the robbery. Respondent contends that the tip meets the two-prong test of reliability and credibility articulated by this Court in *Spinelli* v. *United States*, 393 U.S. 410 (1969) and *Aguilar* v. *Texas*, 378 U.S. 108 (1964). A careful examination of the criteria set fourth in these decisions indicates that the tip plainly fails to measure up to the rigid standards set fourth by the Court in these decisions. Indeed, it is precisely the situation presented here — police reliance on an uncorroborated informant's tip — that the Court in *Aguilar* and *Spinelli* condemned.

Respondent argues that Martin was a reliable informant because he "desperately needed help." It is curious that Respondent should rely upon the "desperateness" of an informant to establish that person's reliability, since such "desperateness" is one of the reasons why this Court has erected strict standards for the use of an informant's tip.

Even assuming the reliability of Martin as an informant, *Aguilar* and *Spinelli* also require that the tip be credible. *See Spinelli*, 392 U.S. at 416. In the present case Martin simply asserted that he had "heard" that Petitioner was involved in the robbery. There was no way to judge the credibility of this bald allegation nor did the police make any attempt to determine its credibility. The Police did not even attempt to determine from whom and under what circumstances Martin heard about Petitioner nor why Martin's sources were reliable.[4] Respondent argues that Martin's tip was credible because he was speaking

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[4] *Compare Spinelli*, 393 U.S. at 416:

> The tip does not contain a sufficient statement of the underlying circumstances from which the informer concluded that Spinelli was running a bookmaking operation. We are not told how the FBI's source

as a suspect, and therefore a possible participant in the crime. But this justification asserted by Respondent is inconsistent with the information provided by Martin. If Martin's tip was to be believed because he was a participant in the crime, his tip would not have been that he heard from others that Petitioner was involved in the crime but that he saw Petitioner or personally had knowledge that Petitioner was involved in a crime. *See United States* v. *Harris*, 403 U.S. 573 (1971) (informant had personal knowledge of and was personally involved in criminal activity with Defendant). Moreover, a suspect's exculpatory tip which implicated another for the same crime is inherently unbelievable. At a minimum, the police had no obligation to attempt to determine whether there existed a credible basis for the tip by inquiring about the identity and credibility of Martin's source and sources, and the circumstances surrounding Martin's obtaining this information. *Cf. United States* v. *Harris*, 403 U.S. 573 (1971).

Respondent had never before contended that the arresting officers had probable cause to arrest Petitioner. An analysis of the bases for probable cause now proffered by Respondent reveals that Respondent's position is simply an after-the-fact attempt to justify an arrest which even Respondent has virtually admitted failed to meet the Fourth Amendment standard of probable cause.

III. Respondent's Analysis Of The Three Factors Set Forth in *Brown* and *Dunaway* Is Not Supported by Either of the Decisions

Respondent's analysis of *Brown* v. *Illinois*, 422 U.S. 590 (1975) and *Dunaway* v. *New York*, 442 U.S. 200 (1979) ignores the explicit reason stated by this Court for adopting the three-

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received his information . . . Moreover, if the informer came by the information indirectly, he did not explain why his sources are reliable.

See also Jones v. *United States*, 362 U.S. 257 (1960); *Draper* v. *United States*, 358 U.S. 307 (1959).

factor test — that is, determining the casual relationship between the illegal arrest and subsequent confession and whether the subsequent confession was an exploitation of the illegal arrest and not a result of Petitioner's exercise of free will. *Dunaway*, 442 U.S. at 216; *Brown* 442 at 602. The inadequacy of Respondent's analysis of these three factors is critical for "the burden of showing admissibility rests . . . on the prosecution." *Brown*, 422 U.S. at 604 (footnote omitted). Respondent clearly has not met this burden.

A. Neither *Brown* Nor *Dunaway* Requires That The Confession Be Caused By The "Shock" Of The Illegal Arrest.

Respondent translates the factor of "temporal proximity" into a determination of whether the confession was caused by the "shock" of the Petitioner's illegal arrest. Nothing in the Court's decisions supports this argument. In *Dunaway*, the Defendant was arrested without incident and transported from the police station for questioning and confessed approximately two hours later. The state court had upheld admission of the confession and distinguished *Brown* v. *Illinois* on the basis that the arrest in *Brown* had been marked by force and threats of violence and therefore the confession was not tainted by the illegal arrest. This Court rejected this position, noting that it "betray[ed] a lingering confusion between 'voluntariness' for purposes of the Fifth Amendment and the 'causal connection', test established in *Brown*." 442 U.S. at 219. [5] Respondent's argument that the confession is tainted only if it was the result of the "shock" of the illegal arrest was raised and expressly rejected in *Dunaway*.

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[5] To reduce the factor of temporal proximity to a question of whether the confession is caused by the "shock" of the illegal arrest completely ignores the deterrent police which is the core of this Court's decisions in *Brown* and *Dunaway*. In *Brown* and *Dunaway* the Court sought to deter arrests without probable cause. See *Brown*, 422 U.S. at 602-03. Unquestionably, many illegal arrests by the police are similar to the arrest in the present case — the relatively uneventful transporting of the individual to the police station for

B. The Intervening Circumstances Relied Upon by the Respondent Are Either Irrelevant to the Issue of Petitioner's Free Will or Actually Detracted from the Petitioner's Exercise of Free Will

Respondent ignores the explicit statements of this Court that the inquiry in each case must be whether the confession was an exploitation of the illegal arrest or whether it was a result of the exercise of free will. *See Brown*, 422 U.S. at 602; *Wong Sun* v. *United States*, 371 486 (1963). Nowhere dies Respondent attempt to offer to the court any explanation of how these three intervening circumstances — issuance of an arrest warrant, the victim's failure to identify Petitioner, and Petitioner's meeting with his girlfriend — contributed to an exercise of free will by the Petitioner.

Simply stated, the arrest warrant is irrelevant in this inquiry. The issuance of an arrest warrant arguably is relevant to the issue of free will if the Defendant is personally brought before a committing magistrate and informed of his rights. See *Johnson* v. *Louisiana*, 406 U.S. 356, 365 (1972); *Brown*, 422 U.S. at 611 (Powell, J., concurring). However, in this case the warrant was not issued after Petitioner had been brought before a committing magistrate and informed of his rights and therefore did nothing to assist Petitioner in the exercise of free will.

Similarly, Respondent leaves the Court to guess how or why the victim's inability to identify Petitioner in a lineup contributed to Petitioner's ability to exercise free will in deciding whether to confess. Nowhere does Respondent provide a citation to the record which indicates that the police even told

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interrogation — and not marked by threats, force, or violence. In the situation presented in this case, however, the person arrested suffers the same loss of liberty and freedom as does the person arrested by force or violence. And *Dunaway* certainly condemns this species of unconstitutional police conduct as strongly as the illegal arrest effectuated with force or violence.

Petitioner of Mrs. Moseley's inability to identify him.[6] Needless to say, a fact not even made known to Petitioner could hardly have assisted him in considering his situation.[7]

Finally, as noted above, Respondent's reliance on the Petitioner's meeting with his girlfriend flies in the face of the clear and uncontradicted testimony of Petitioner about the content and purpose of the meeting. Respondent provides the Court little explanation of how a police decision to interrogate Petitioner and inform Petitioner of the severity of the penalty and possibly of leniency if he cooperates, all in his girlfriend's presence, contributed to Petitioner's exercise of free will. Also, Respondent fails to detail how Petitioner's girlfriend, who was emotionally upset and crying and used by the police to obtain a confession, could have conversed with Petitioner so as to contribute to Petitioner's ability to carefully objectively consider the alternative options he could exercise. Indeed, as the record makes clear, the purpose and effect of the meeting was to exploit the illegal arrest of Petitioner.

Respondent has chosen to draw the Court's attention to several intervening circumstances. Respondent apparently argues that events intervened between the illegal arrest and confession and therefore the confession is admissible. But surely *Brown* and *Dunaway* command that any analysis of intervening circumstances do not take place without an appreciation of the relationship between the intervening event and the individual's exercise of free will. In the present case

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[6] Even assuming that Petitioner was aware of this inability to select him from the lineup, the police continued to interrogate Petitioner and continued to treat him as if he were primary suspect in the case.

[7] Also, any determination of whether the police exploited the illegal arrest to obtain a confession cannot be made without considering the effect of the police interrogation which occurred in the presence of the Petitioner's girlfriend. Thus, events occurring prior to this meeting must be evaluated in the context of the officers' other misconduct in exploiting the illegal arrest.

none of these intervening circumstances sufficiently contributed to Petitioner's exercise of free will and therefore did not attenuate the taint of Petitioner's illegal arrest.

C. Respondent's Attempt To Distinguish the Flagrant Police Misconduct from the Police Misconduct in *Dunaway* Is Specious.

Respondent contends that the police misconduct at issue was neither a flagrant violation of Petitioner's constitutional rights nor a purely investigatory arrest. The police misconduct in this case is a virtual replica of *Dunaway* — the police acted solely on the basis of an uncorroborated informant's tip and made an investigatory arrest of Petitioner. Respondent's attempts to distinguish *Dunaway* are, to say the least, specious.

Respondent contends that unlike *Dunaway* other facts were relied upon by the police — the fingerprinting and the description — to justify the arrest. Regardless of the presence of these other alleged pieces of evidence, the fact remains that the arrest was a clear violation of the Fourth Amendment. Also, as noted above, neither of these factors could have provided any basis to link Petitioner to the robbery. Therefore, even assuming any legal validity to such a distinction, it simply is not applicable in this case.

Respondent also attempts to distinguish *Dunaway* on the basis that in the present case the arrest had focused on one individual and there-fore it was not a purely investigative seizure as in *Dunaway*. The record in this case clearly reveals the investigative nature of Petitioner's arrest. As in *Dunaway*, the police decided to check out an uncorroborated tip by an unconstitutional seizure of Petitioner.[8]

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[8] Respondent offers two other bases for distinguishing the police misconduct in the present case from that in *Dunaway* which hardly merit discussion. First, Respondent argues that unlike *Dunaway*, in the present case the police informed Petitioner that he was under arrest. Respondent fails to articulate why this distinction is legally significant. If anything, this candid admission

IV. The Alleged Good Faith of the Arresting Officers Was Not Developed in The Record, Is Not Properly Before This Court, and, in any Event, Does Not Limit the Application of the Exclusionary Rule.

For the first time in this entire proceeding Respondent raises the argument that because the police officers assertedly acted in a good faith reasonable belief that the arrest was legal the confession should be admissible. In so arguing, Respondent and its police groups amici[9] urge the Court to adopt a "good faith" exception to the Fourth Amendment exclusionary rule.

Any decision by this Court to entertain such an argument, which Petitioner contends should be rejected, should await the case that properly raises that issue and develops evidence relevant to it in the record. No evidence of good faith belief of the police was introduced and no findings of such good faith were made by the trial court. Even assuming the existence of such an exception the police conduct in this case would not be subject to the exception. Under any definition of good faith exception proposed by Respondent, the police conduct at the issue in this case could not be found under applicable standards of law to have occurred in good faith. [10]

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only highlights the arresting officers' blatant violation of the Fourth Amendment. Second, Respondent argues that unlike *Dunaway*, the arrest in the present case took place during the day. The facts of *Dunaway* state only that the Defendant had been arrested in the "morning." 442 U.S. at 203. Whatever the time of Petitioner's arrest, certainly nothing in the Constitution nor this Court's decisions supports the distinction drawn by Respondent.

[9] Respondent is joined in by amici Americans for Effective Law Enforcement, Inc. and various police groups from the State of Illinois including the Chicago Police Department.

[10] In other areas of the law the Court has stated that a principle of "good faith: must encompass both a subjective and objective component. *See Wood v. Strickland*, 420 U.S. 308, 321-22 (1975). The former test is a determination of what the arresting officers actually believed while the latter requires an inquiry into what a reasonable police officer should have known about the

In this case the constitutional standard governing the conduct of the police was clear. In *Aguilar* and *Spinelli*, decided ten years before the arrest of Petitioner, this Court had clearly condemned the reliance of an uncorroborated informant's tip to establish probable cause. Respondent would have the court believe that the police in this case were faced with an unclear constitutional standard of probable cause governing their conduct and that the police acted in a good faith belief that their conduct measured up to Fourth Amendment standards. [11] In this case, there was nothing unclear, difficult, or perplexing about the constitutional standards governing the police conduct; and if there were any doubts, the police had more than sufficient time to present their evidence to a magistrate. [12]

From a prudential and jurisprudential standpoint this certainly is not the case in which the Court should seek to decide the

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constitutionality of the conduct at issue. Considering that *Aguilar* and *Spinelli* had clearly spelled out the law in this area the officers' conduct plainly failed to pass the objective test. There is no evidence in the record to support any claim that the officers conduct met the subjective test.

[11] Respondent's discussion on this point is not all anchored to the facts of this case. Respondent and its police groups amici describe generally the dilemma police supposedly face when forced to interpret unclear pronouncements by this Court in spur of the moment situations. This is certainly not such a case — the police waited two weeks before acting on the Respondent which even arguably could have supported the blatantly unconstitutional police misconduct.

[12] As Professor Yale Kamisar has recently noted, police officers who apply in good faith for a warrant but who are denied one for lack of probable cause could hardly proceed to execute the search or arrest. The constitutional standard is probable cause, not good faith belief in probable cause. Although there may be a need to permit some searches or arrests proper to the consideration of probable cause by a neutral and detached magistrate, it makes no constitutional sense to permit the police to make use of evidence, that they would never have had access to had the magistrate's ex parte consideration been interposed when it would have been effective. *See* Kamisar, *Search and Seizure in America*, 10 Human Rights 14 (1982).

important issue of whether a good faith exception should be superimposed upon the long-standing exclusionary rule. There were no findings by the trial court nor any testimony by the arresting officers of the issue of good faith. The absence of a well-developed factual record on the issue of good faith can only impair this Court's reviewing function.[11]

CONCLUSION

The judgement of the Supreme Court of Alabama should be reversed. Respondent has virtually conceded the lack of probable cause to arrest Petitioner and failed to carry its burden of proving that the confession was not tainted by the illegal arrest.

Respectfully submitted

/s/ ROBERT M. BENO
Robert M. Beno
Counsel for Petitioner

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[11] *See International Bhd. of Teamsters* v. *Denver Milk Producers*, 334 U.S. (1948) (per curiam) (refusal to decide constitutional issue because of inadequacy of the record).

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No. 81-5152

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

OMAR TAYLOR,
Petitioner
v.
STATE OF ALABAMA,
Respondent

On Writ of Certiorari to the Supreme Court of Alabama

BRIEF AMICUS CURIAE OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER OMAR TAYLOR

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INTEREST OF AMICUS [1]

The American Civil Liberties Union is a nation-wide, non-partisan organization of over 250,000 members, dedicated solely to defending the principles of freedom and democracy embodied in the Bill of Rights.

Central to those freedoms is the right to be free from unreasonable government searches and seizures protected by the Fourth Amendment of the United States Constitu-

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[1] Letters of consent to the filing of this brief from the parties have been lodged with the Clerk of the Court.

tion. That Amendment erects a critical barrier between the government and the citizen, and defines the standards which the government must follow whenever it seeks to invade "the right of the people to be secure in their persons."

The ACLU has repeatedly urged upon this Court a "strict construction" of that Amendment. In *Brown v. Illinois*, 422 U.S. 590 (1975) and *Dunaway v. New York*, 442 U.S. 200 (1979) this Court specifically suppressed confessions obtained pursuant to illegal arrests to further the independent Fourth Amendment interests at stake.[2] The Supreme Court of Alabama has ignored the mandate of these decisions and condoned police conduct which can only be described as an intentional disregard of the Fourth Amendment. It is the purpose of this brief to demonstrate that affirmance of the Supreme Court of Alabama opinion will lead to continued intrusions on the Fourth Amendment rights of every citizen.

STATEMENT OF THE CASE

On December 2, 1978, three black males robbed Moseley's Grocery Store in Montgomery, Alabama. This was one of a number of robberies that had occurred within the period of a few weeks in the same area of Montgomery. As part of their investigation, the police interviewed several individuals they suspected of being involved in the robberies. App. at 7.[3]

One of the persons interviewed as a suspect was Charles Martin, who, at the time of the interview, was in-

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[2] The ACLU filed an *amicus curiae* brief in *Dunaway*.

[3] The facts are taken from the opinions of the Supreme Court of Alabama and the Alabama Court of Criminal Appeals as well as from the trial transcript and transcript of the Hearing on the Motion to Suppress, which are contained in the joint appendix. Citations are to the joint appendix ("App. at ——") and the portions of the transcript to the Hearing on the Motion to Suppress which are not included in the joint appendix. ("Hearing on Motion to Suppress, Tr. at ——").

carcerated on charges of rape and robbery in an unrelated matter. App. at 2. Martin was interviewed by Officer R. D. Mobeley. Martin denied any involvement in the robberies but told Officer Mobeley he "had heard that [petitioner] was involved in the robbery of Moseley's Grocery." App. at 36. Martin did not tell Officer Mobeley how or from whom he obtained this information. App. at 8.

Officer Mobeley made no attempt to determine the accuracy of the information about petitioner's involvement in the robbery or the credibility or reliability of Martin. App. at 8-10. Instead, he passed the information along to two officers assigned to the Robbery-Homicide Division of the Montgomery Police Department. App. at 6. Approximately two weeks later, on January 4, 1979, at about 3:00 p.m., these two officers arrested petitioner as he walked out of a pool hall. The arrest was made without a warrant and based solely on the word of Martin that he had heard petitioner was involved in the robbery. App. at 26. There is nothing in the record to indicate that the police did anything during the two weeks before petitioner's arrest to substantiate Martin's story or to obtain a warrant for petitioner's arrest. App. at 37.

The officers told petitioner that he was under arrest for the robbery of Moseley's Grocery Store. Petitioner was searched for weapons, placed in the patrol car, read his constitutional rights, and driven to the police station. Upon his arrival at the station, petitioner was questioned by detectives about the robbery. He denied any involvement. This initial interrogation lasted approximately twenty minutes. App. at 11.[4]

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[4] Many of the facts are taken from petitioner's testimony at the hearing on the motion to suppress. Much of his testimony regarding the events after his arrest was uncontroverted.

After being interrogated, petitioner was fingerprinted and placed in a lineup. The owners of the grocery store, who were present at the time of the robbery, were unable to identify petitioner. App. at 38. The lineup lasted approximately one hour and petitioner was then placed in a jail cell. App. at 12.

Approximately ten minutes later, two detectives took petitioner to an office for more interrogation. One of the detectives told petitioner that his fingerprints matched a set of prints found on merchandise handled by one of the robbers.[5] The detectives also examined a photograph in front of petitioner and told him that he resumbled one of the robbers. Petitioner requested to see an attorney. App. at 13. The detectives told petitioner that "[he] could get one" and returned him to his cell.[6] App. at 13. At no time did he consult with an attorney.

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[5] Petitioner testified that he was confronted with his fingerprints after the second round of interrogation at the station house. One of the interrogating officers, Detective Hicks, corroborated petitioner's testimony. Hearing on Motion to Suppress, Tr. at 36. On redirect, however, Hicks testified that he did not confront petitioner with the information on the matching fingerprints until after petitioner signed a waiver of rights form. *Id.* at 40. The Alabama Court of Criminal Appeals concluded that petitioner was confronted with the matching prints before waiving his rights App. at 28, 34.

[6] Petitioner's testimony at the suppression hearing raises a substantial question whether he understood what his rights were when he was informed of them. When the prosecutor asked, "Did you understand those rights that they read to you?", petitioner responded in part, "I was understanding that I signed the form that I would be given an opportunity to speak with a Lawyer." App. at 16. The police testimony does not dispute this. When asked what he did "to make sure [petitioner] understood his rights," Detective Hicks testified: "We read the rights form to him. Let him read one copy as I read it to him. And he signed it at the bottom of the copy." Hearing on Motion to Suppress, Tr. at 28. *See also* App. at 21.

Detective Hicks testified that petitioner never requested an attorney, although petitioner testified to the contrary. App. at 13, 21. Because the issues of whether petitioner understood his rights and

Later that evening, after petitioner had been in custody for more than five hours, two detectives removed him from his cell for more interrogation. As he was being led to an office, he noticed that his girlfriend and two of his neighbors were present at the police station, but he was not allowed to meet with them at that time.

The police led petitioner to an interview room and again resumed their interrogation. Petitioner again refused to admit any involvement in the robbery.

After petitioner refused to make a statement, the detectives brought his neighbor, Charles Williams, into the room. App. at 14. They asked petitioner whether he knew and trusted Williams. Petitioner testified that one of the detectives said, "[M]e and Charles been knowing each other for a long time . . . . Charles been doing me favors." *Id.* Williams responded, "Yeah, he do me favors." *Id.* The detectives again told petitioner that they knew he had robbed the grocery store and that his fingerprints from the store would stand up in any court. Hearing on Motion to Suppress, Tr. at 36.

Finally, the detectives brought petitioner's girlfriend into the room. The group in the room then included petitioner, Williams, the girlfriend, and the detectives. App. at 14. The detectives told petitioner that he faced a sentence of ten years to life for committing the robbery, but that he could help himself if he signed a statement. *Id.* One of the detectives told petitioner that if he cooperated, "he would talk to the judge, and it is a possibility that he could get [petitioner] a suspended sentence

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the propriety of the continued interrogation after a request for counsel were not raised at trial, this factual dispute is not directly relevant to the issues before this Court. Failure by the police to honor a request for counsel clearly violates an individual's constitutional rights. *Edwards v. Arizona*, 101 S. Ct. 1880 (1981).

[or] probation."[7] *Id.* Petitioner's girlfriend became upset and began to cry. *Id.* The detectives then left the room. Approximately ten minutes later, they returned and petitioner confessed.

At trial petitioner moved to suppress the confession and the fingerprints taken after his arrest on the ground that his arrest had been illegal and the confession and fingerprints were fruits of the illegal arrest. The trial court excluded the fingerprints but admitted the confession. Petitioner later was fingerprinted at trial and these prints were admitted into evidence. App. at 19-20. In addition, a fingerprint expert who previously had examined the suppressed prints testified at trial that petitioner's fingerprints matched the fingerprints found at the grocery store.

Petitioner was found guilty of robbery and sentenced to thirty years. The Alabama Court of Criminal Appeals reversed the trial court's denial of the motion to suppress the confession, holding that under this Court's decisions in *Brown v. Illinois*, 422 U.S. 590 (1975) and *Dunaway v. New York*, 442 U.S. 200 (1979) the confession was the fruit of an illegal arrest. The Supreme Court of Alabama reversed, distinguishing *Brown* and *Dunaway* on the basis that six hours had passed between the time of the illegal arrest and confession and on the presence of intervening circumstances.[8] Petitioner filed a petition for a writ of certiorari which this Court granted.

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[7] Detective Hicks testified that while he might have told petitioner that the judge would be informed if petitioner cooperated, he did not make any explicit promises of leniency. Hearing on Motion to Suppress, Tr. at 31.

[8] Besides distinguishing *Brown* and *Dunaway* the court apparently applied a balancing test weighing the costs of the exclusionary rule against its benefits. App. at 41. Such an analysis finds no support in either *Brown* or *Dunaway*. The court, of course, was bound to apply federal law. *Cooper v. Aaron*, 358 U.S. 1 (1958).

SUMMARY OF ARGUMENT

There is no dispute that petitioner's arrest was without probable cause and therefore was illegal. The Supreme Court of Alabama held, however, that the taint of petitioner's illegal arrest was purged and that his confession and the expert testimony at his trial about the suppressed fingerprints were properly admitted into evidence. That decision cannot be reconciled with this Court's decision in *Brown v. Illinois*, 422 U.S. 590 (1975), *Dunaway v. New York*, 442 U.S. 200 (1979), and *Davis v. Mississippi*, 394 U.S. 721 (1969).

The Supreme Court of Alabama attempted to distinguish *Brown* and *Dunaway* on several bases. The court pointed to the time between petitioner's arrest and confession and events which it characterized as intervening circumstances. Neither distinction is persuasive. The court's distinction on the basis of the length of time and presence of intervening circumstances cannot withstand scrutiny. During the six-hour period between petitioner's illegal arrest and confession he was fingerprinted, placed in a lineup, interrogated three times, and kept in a jail cell. At no time did petitioner have an opportunity to consult with an attorney, although he testified at the suppression hearing that he requested to do so. Finally, in the presence of his neighbor and girlfriend, petitioner was confronted with the evidence the police claimed to have against him. It eviscerates this Court's decisions in *Brown* and *Dunaway* to hold that the six hours between petitioner's illegal arrest and his confession, under the circumstances, attenuated the taint of that illegal arrest.

Similarly, the weight given by the Supreme Court of Alabama to petitioner's meeting with his girlfriend and neighbor during the six hour ordeal misreads this Court's decisions in *Brown* and *Dunaway*. Petitioner's meeting with his girlfriend was carefully orchestrated by the police. Its purpose was not to provide petitioner an opportunity to assess objectively his situation, but to pressure him into making a confession. In the presence of his girlfriend, the police told petitioner of the severe

consequences of his conviction and the advantages of cooperation. At this point petitioner's girlfriend became upset and began to cry. Within ten minutes of this outburst petitioner confessed. This bears no resemblance to the type of intervening circumstances this Court found sufficient in *Johnson v. Louisiana*, 406 U.S. 356 (1972) to remove the taint of an illegal arrest.

The fact that petitioner was given his *Miranda* warnings in this case is irrelevant to the Fourth Amendment question presented. The circumstances in which each set of warnings was given clearly indicate that they could not have contributed to a decision by petitioner to exercise free will. To give significance to *Miranda* warnings in this case would, as this Court recognized in *Brown*, substantially undermine the deterrent purpose of the exclusionary rule. This is especially true where, as here, the police misconduct in violating the Fourth Amendment is flagrant and purposeful.

Finally, the trial court's admission of expert testimony about petitioner's suppressed fingerprints at his trial undermined its earlier decision to suppress those fingerprints. The effect of that decision was to circumvent petitioner's rights under the Fourth Amendment.

ARGUMENT

I. PETITIONER'S ARREST WAS ILLEGAL

There can be no dispute that petitioner's arrest was illegal. It was made without a warrant and without probable cause. Decisions of this Court have consistently required probable cause to make an arrest. *E.g.*, *Gerstein v. Pugh*, 420 U.S. 103, 111-12 (1975), *Brinegar v. United States*, 338 U.S. 160, 176 (1949). This requirement for probable cause extends not only to an arrest characterized as such under state law but also to those cases in which the seizure "intrudes so severely on interests protected by the Fourth Amendment as necessarily to trigger the traditional safeguards against illegal arrest." *Dunaway v. New York*, 442 U.S. at 216; *see also Davis v. Mississippi*, 394 U.S. 721 (1969).

Respondent does not contend, nor could it, that the informant's unsubstantiated tip was sufficient to provide probable cause for petitioner's arrest. *See Spinelli* v. *United States*, 393 U.S. 410 (1969); *Aguilar v. Texas*, 378 U.S. 108 (1964). Indeed, at the suppression hearing the prosecutor stated, "[I]t is not my position that [the tip given by the informant] Charles Martin gave this Detective information which amounted to probable cause."[9] App. at 4. The trial court's suppression of the fingerprints taken after petitioner's arrest indicates that it too believed that petitioner's arrest was made without probable cause. The only issues before this Court, therefore, are whether petitioner's confession and the expert fingerprint testimony should have been suppressed as fruits of the illegal arrest.

II. PETITIONER'S CONFESSION WAS OBTAINED THROUGH EXPLOITATION OF THE ILLEGAL ARREST AND THEREFORE SHOULD HAVE BEEN SUPPRESSED

In *Brown v. Illinois*, 422 U.S. 590 (1975) and *Dunaway v. New York*, 442 U.S. 200 (1979) this Court identified three factors which must be analyzed to determine whether a confession obtained subsequent to an illegal arrest is so tainted by the illegal arrest that it is inadmissible: 1) the temporal proximity between the illegal arrest and the confession; 2) the presence of intervening circumstances; and 3) the purpose and flagrancy of the police conduct. *Brown*, 422 U.S. at 603-04; *Dunaway*, 442 U.S. at 218.[10] These three factors are to be considered in light of the primary purpose of the exclusionary rule—deterrence of illegal police conduct.

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[9] In the present case petitioner's arrest and detention exceeded the scope of the less intrusive seizures condemned in *Davis* and *Dunaway*. Petitioner was arrested, searched for weapons, placed in a patrol car, and driven to the police station where he was interrogated, fingerprinted, photographed and placed in a cell.

[10] The State has the burden of proving that the confession and expert fingerprint testimony were not tainted by the illegal arrest. *See Brown*, 422 U.S. at 604.

Temporal proximity and the presence of intervening circumstances are relevant to the causal connection between the illegal police conduct and the confession. The closer the causal connection between the illegal police conduct and confession, the greater the likelihood that admission of the confession will encourage illegal police conduct. Conversely, the less the causal connection between the illegal arrest and confession, the more likely the confession is the result of the defendant's free will rather than the illegal police misconduct.[11] *See Wong Sun v. United States*, 371 U.S. 471 (1963). Similarly, the more flagrant the police misconduct the more likely the admission of the confession will encourage disregard of Fourth Amendment rights by the police.

The Supreme Court of Alabama correctly stated the test of *Brown* but disregarded that decision's mandate that the analysis "must be [made] on the facts of each case." *Brown*, 422 U.S. at 603. Only if a court performs this critical analysis can it determine whether admission of the confession is consistent with the distinct policies and interests of the Fourth Amendment. *Brown*, 422 U.S. at 602.

A. The Six Hour Time Lapse Between the Illegal Arrest and Confession Did Not Attenuate the Taint of the Illegal Arrest

The Supreme Court of Alabama distinguished *Brown* and *Dunaway* on the basis that petitioner "had been under arrest for more than six hours when he made his statement," as opposed to less than two hours in *Brown* and *Dunaway*. App. at 41. This facile distinction which focuses only on the length of time rather than the conditions of the detention completely overlooks the entire basis for this Court's decision in *Brown*.

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[11] The Court's emphasis on whether a confession is a result of a defendant's free will is intended to further the separate policies which underlie the Fourth Amendment and is a required inquiry independent of and in addition to the threshold requirement that the confession satisfy the Fifth Amendment test of voluntariness. By referring to "free will" the Court is concerned solely with the causal connection between the illegal arrest and confession. *Brown*, 422 U.S. at 602.

The Alabama Supreme Court completely failed to analyze how this six hour lime lapse could have weighed in favor of a finding that the confession was a product of free will. Only if this inquiry is made can a court determine whether suppression of the confession would further the independent Fourth Amendment policies at issue. The Court in *Brown* expressly required that "consideration of a statement's admissibility [be done] in light of the distinct policies and interests of the Fourth Amendment." *Brown*, 422 U.S. at 602.

The Supreme Court of Alabama ignored these policies and instead used a rigid analysis which can be best summarized as follows: because six hours is longer than two hours, the confession is more likely to be a product of free will. This analysis completely ignores the factual circumstances of petitioner's six hour detention which could only have frustrated petitioner in any attempt to exercise free will, and is directly contrary to this Court's statement in *Rawlings v. Kentucky*, 448 U.S. 98, 107 (1980) that "it [is] necessary to examine the precise conditions under which the [individual was] detained." [12]

A chronology of petitioner's six hours of detention reveals that he was interrogated twice alone and once in the presence of his girlfriend and a neighbor. The final interrogation session ended in an emotional outburst by petitioner's girlfriend. In the time between the various interrogation sessions petitioner was fingerprinted, placed in a lineup, and photographed. Between these various investigative procedures petitioner was placed in a jail cell for periods ranging from ten to twenty minutes.

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[12] *See also Wong Sun v. United States*, 371 U.S. 471, 486 (1963). To be sure, in both *Wong Sun* and *Rawlings* the Court was discussing temporal proximity in the context of a confession which followed the illegal detention by a short amount of time. However, the emphasis the Court placed on the circumstances of the detention is no less relevant in considering a lengthier period of time. The critical issue remains the petitioner's free will and whether he has time to carefully consider the alternative choices outside of the coercive pressures of police investigative procedures.

Nowhere in its opinion does the Supreme Court of Alabama give any indication when or how in this six hour time period petitioner had the opportunity to consider carefully his situation and exercise his own free will. Petitioner was constantly being shuttled back and forth between a jail cell and interrogation or other investigative procedures. Time spent in an interrogation room or while subjected to other police investigative procedures certainly cannot be considered time available for petitioner carefully to consider his options. Such careful consideration is essential to the exercise of free will. The inherently coercive nature of these procedures could only frighten and confuse petitioner rather than permit him to make a decision based on free will. Nor could the short periods of time between the various procedures have given petitioner the necessary time to consider his situation. No sooner than petitioner was returned to his cell, the police would remove him for more interrogation and investigation.

The emphasis by the Supreme Court of Alabama on the length of time rather than the conditions of petitioner's confinement during that time severely undercuts the deterrence policy which is the basis of this Court's decision in *Brown*.[13] The effect of this ruling is to allow the police to purge the taint of an illegal arrest simply by processing the individual through the typical police investigative procedures.[14] This ability to purge the taint by conduct-

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[13] Also, from the standpoint of judicial application of the Court's test in *Brown*, focusing simply on the length of time can only lead to confusing results. For example, if six hours weighs in favor of a finding of absence of taint but two hours does not, what effect is a court to give to a three hour or four hour time lapse. It is evident that the necessary line-drawing required by *Brown* is meaningless and unbounded unless the courts are required to apply the factor of temporal proximity in light of the policies of the Fourth Amendment.

[14] Presumably, the reasoning used by the Supreme Court of Alabama would similarly apply even if the petitioner had been interrogated for six consecutive hours.

ing "business as usual" at the police station cannot be squared with the importance this Court in *Brown* placed on the deterrence of illegal police conduct.

B. The Police Used Petitioner's Meeting With His Girlfriend and Neighbor to Exploit the Illegal Arrest and Obtain a Confession

The reliance by the Supreme Court of Alabama upon petitioner's meeting with his girlfriend and a neighbor as an intervening factor has absolutely no factual support.

The facts surrounding the meeting clearly indicate that the police sought to intimidate and frighten petitioner's girlfriend so that she would urge him to confess. Initially, it is important to remember that prior to the meeting petitioner had been interrogated twice and each time denied being involved in the robbery. Also, the only witnesses to the robbery, the owners of the grocery store, were unable to select petitioner from a lineup. The weakness of the case was evident; it became critical to obtain a confession. It was in this context that the police resumed the last round of interrogation. When petitioner again denied any involvement in the robbery the police brought in his neighbor, Charles Williams, who was acting in cooperation with the police.[15] When petitioner did not confess the police brought his girlfriend into the room.[16]

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[15] As with petitioner's girlfriend the police continued to interrogate petitioner in Williams' presence. The decision to bring Williams into the room only reinforces the clear fact that the police used the third parties solely to obtain a confession. Petitioner testified that the police told petitioner that Williams often did the police "favors" and that Williams likewise was the recipient of police "favors."

[16] There is a factual dispute over whether petitioner, at that time, requested to talk to his girlfriend or whether the police brought her into the interview room on their own. Petitioner testified that it was the decision of the police to bring her into the interview room. App. at 14. Detective Hicks, the interrogating officer, testified that the petitioner had asked to see his

With petitioner's girlfriend present the officers continued the interrogation. In her presence the officers stated that petitioner faced "ten years to life" but that the judge would be informed of any cooperation by petitioner. At this point, petitioner's girlfriend became upset and began to cry. The officers then left the room and approximately ten minutes later petitioner confessed.[17]

This meeting was the essence of police exploitation of an illegal arrest. It borders on the incredible for the Supreme Court of Alabama to have relied upon this meeting to conclude that the confession was a result of petitioner's free will. Indeed, it could have had only the opposite effect—increasing the psychological and emotional pressures on petitioner to confess.[18]

Just how far the Supreme Court of Alabama was off the mark is clear from comparing the facts of this case to *Johnson v. Louisiana*, 406 U.S. 356, 365 (1972), which was cited in *Brown* as an example of an intervening circumstance. *Brown*, 422 U.S. at 603-04. In *Johnson*, the defendant challenged a lineup held after an illegal arrest. Between the time of the illegal arrest and lineup the defendant, represented by an attorney, was presented to a magistrate. The Court held that this purged the taint of the illegal arrest.

The distinctions between *Johnson* and this case are obvious and give an indication of what factors might be

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girlfriend. Hearing on Motion to Suppress, Tr. at 31, 35. This factual dispute is irrelevant to the disposition of the case. The outrageous behavior of the police at the meeting leaves no doubt that regardless of who initiated the meeting, the meeting was designed to exploit the illegal arrest and in no way contributed to petitioner's exercise of free will.

[17] It is not clear if only Detective Hicks left the room or whether both of the detectives and Williams left petitioner and his girlfriend in private. App. at 14.

[18] *Rawlings v. Kentucky*, 448 U.S. 98 (1980) is distinguishable. In *Rawlings* there was no attempt by the police to exploit the relationship between the defendant and a female companion.

important in determining whether the intervening circumstance contributed to the exercise of free will.[19] Neither Williams nor petitioner's girlfriend was in any position to provide petitioner with objective advice to aid him in the exercise of free will. Although Williams was petitioner's neighbor, he was known to cooperate with the police. *Cf. Fare v. Michael C.*, 442 U.S. 707, 720 (1979) (request to speak to probation officer not equivalent to request to speak to lawyer because probation officer is agent of the state and thus may not be able to act in best interest of accused). Nor was petitioner's girlfriend able to provide petitioner with objective advice, since she was emotionally involved in the entire matter. Neither the neighbor nor petitioner's girlfriend can be compared to a neutral judicial officer.[20]

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[19] The Supreme Court of Alabama cited *Johnson* to support its conclusion that the filing of an arrest warrant between the time of the illegal arrest and confession could remove the taint. *Johnson* clearly does not support such a position. The significance of the Court's citation to *Johnson* in *Brown* is of course related to the ultimate question of whether the petitioner exercised free will in deciding to confess. Filing of an arrest warrant had absolutely no effect on the petitioner's ability to exercise free will. In contrast, presentation to a neutral magistrate would have given petitioner an opportunity to receive an explanation of his rights from someone other than a police officer and also remove him from the coercive environment of police custody.

To accept the conclusion of the Supreme Court of Alabama would be to encourage police officers to make illegal arrests knowing that the taint could be removed merely by the after-the-fact justification of filing an arrest warrant.

[20] *See also Brown*, 422 U.S. at 611 (Powell, J., concurring) (to purge taint would require presentation to magistrate or consultation with attorney). Also, in *Johnson* the defendant was represented by a lawyer when presented to the magistrate. The Court in *Johnson* did not attribute especial significance to the presence of a lawyer. In other instances, however, the Court has expressly recognized the unique role a lawyer can play in assisting the accused in a decision on whether to exercise his Fifth Amendment privilege. *See Fare v. Michael C.*, 442 U.S. at 719 (1979).

Moreover, even if Williams or petitioner's girlfriend had been in a position to assist petitioner to make an independent decision neither of them could have provided petitioner a complete or accurate appraisal of his rights or alternative choices.[21] In contrast, a magistrate has knowledge of the law and particularly the rights of the accused.

Finally, petitioner's meeting with his girlfriend and Williams was almost entirely in the presence of the police. When both Williams and petitioner's girlfriend came into the interview room the police remained and continued their interrogation. From the first moments of the meeting the police created an intensely emotional atmosphere in the room which only increased the pressures on petitioner to confess. This was not a meeting in which petitioner could converse freely and independently with third parties. At all times petitioner remained within the reach of his accusers and could get no respite from their incessant interrogation. This situation hardly can be compared to the relatively pristine environment of a magistrate's courtroom.

In sum, this case does not present the kind of intervening circumstance contemplated by *Brown*. The only difference between this case and *Brown* is that here the police attempted to use more concerted methods to obtain a confession through exploitation of the illegal arrest. The Court in *Brown*, however, warned that courts must cerefully assess the facts of each case because "the possibilities of misconduct [are] too diverse." *Brown*, 422 U.S. at 603. Far more than in *Brown*, the evidence of police exploitation of the illegal arrest is clear.

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[21] For example, petitioner's girlfriend may well have believed that the detective had the power to make a binding promise of leniency of sentence if petitioner confessed and may have so advised petitioner.

C. The Giving of *Miranda* Warnings Was Irrelevant in the Circumstances of this Case

The Supreme Court of Alabama placed substantial emphasis upon the fact that petitioner had been given his *Miranda* warnings on three separate occasions.[22] The fact that petitioner was advised of his constitutional rights as required by *Miranda* does not support a finding that the confession was untainted by the illegal arrest. The context in which the warnings were given to petitioner indicates that the Supreme Court of Alabama grossly overestimated their significance. The Court in *Brown* specifically warned against placing too much emphasis on the fact that *Miranda* warnings are given.[23] 422 U.S. at 603.

The first set of *Miranda* warnings was given at the time of petitioner's arrest. It is unclear whether petitioner understood his rights at that time; the arresting officers certainly made no effort to determine whether petitioner understood them.[24] Petitioner was given a

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[22] Placing any significance on the fact that *Miranda* warnings were given on three separate occasions overlooks the clear fact that the police therefore had continually interrogated petitioner. This continued interrogation certainly was an attempt to exploit the illegal arrest. Thus, to give any significance to repeated Miranda warnings would be an implicit approval of continued interrogation as a means of purging the taint of the illegal arrest.

[23] In *Dunaway* the Court clarified this statement in *Brown* by concluding that *Miranda* warnings only go toward satisfying the initial Fifth Amendment requirement of voluntariness. *Dunaway*, 442 U.S. at 217. This, of course, follows from the fact that failure to give *Miranda* warnings alone would be a basis for suppressing the confession, making the entire *Brown* analysis unnecessary. *Cf. Rawlings v. Kentucky*, 448 U.S. 98, 107 (1980).

[24] The arresting officer, Officer Alford, testified that "I did not ask him anything concerning his rights. I just advised him of his rights." App. at 27. This routine manner of simply reading petitioner the *Miranda* warnings without asking him if he understood his rights indicates that this set of warnings is insignificant as a factor indicating that petitioner confessed out of an act of free will. *See also* note 6 *supra*.

second set of Miranda warnings while being put through the panoply of station house booking and investigation procedures. He was advised of his rights a third time, just before he confessed, after the highly emotional meeting with his girlfriend. In the context of this case the fact that petitioner was advised of his *Miranda* rights three times is irrelevant.

D. Petitioner's Confession Should Have Been Suppressed Because of the Flagrant Disregard by the Police of the Fourth Amendment

The actions of the officers involved in the investigation and arrest of petitioner demonstrate a total disregard for firmly established constitutional standards. Petitioner was arrested on the basis of an unsubstantiated informant's tip. At the time of the arrest this Court had long ago unequivocally condemned the practice of relying on an informant when there is no independent basis for concluding that the informant is reliable or credible. *See Spinelli v. United States*, 393 U.S. 410 (1969); *Aguilar v. Texas*, 378 U.S. 108 (1964). None of the officers denied knowledge of the requirements of these cases. Yet the officers intentionally chose to ignore their mandate.

The failure to make any attempt to verify the informant's tip or determine whether the informant was reliable cannot be explained by lack of time. Approximately two weeks passed between the officer's conversation with the informant and the arrest of petitioner, but no effort was made to use less intrusive investigative techniques.

Nor can the arresting officers justify their conduct by arguing that the seizure of petitioner was not an arrest requiring probable cause. The officers informed petitioner that he was under arrest for the robbery of the grocery store and the events which followed demonstrate that the seizure of petitioner was not intended as anything other than a full-blown arrest.

In short, petitioner's arrest was clearly investigative. Instead of using normal—and constitutional—police investigative techniques, the officers arrested petitioner for the purpose of engaging in a "fishing expedition."

In such a clear case of flagrant and purposeful disregard of an individual's constitutional rights the failure to suppress the confession can only serve to encourage illegal police behavior. Admission of this confession into evidence would be viewed by the police as judicial approval of police practices which the officers knew, and certainly should have known, were prohibited by the Constitution. Only by suppression of the confession can the police be deterred from engaging in such flagrant violations of the Constitution.

III. THE TESTIMONY OF THE FINGERPRINT EXPERT SHOULD HAVE BEEN SUPPRESSED AS A FRUIT OF THE ILLEGAL ARREST

The trial court properly suppressed the first set of fingerprints as being the fruit of petitioner's illegal arrest. Thereafter, however, petitioner was fingerprinted at trial and these prints were admitted into evidence. The fingerprint expert (whose testimony was based on the illegally seized fingerprints), testified regarding similarities between the petitioner's fingerprints and the fingerprints found at the scene of the robbery. This testimony was clearly derived from the illegally obtained fingerprints and therefore should have been suppressed. *United States v. Crews*, 445 U.S. 463 (1980).

In *Crews* the police obtained a photograph of defendant while he was being illegally detained. Victims of the crimes then selected that photograph from a photo array. Two days later the victims selected defendant out of a lineup. Finally, one victim identified defendant at trial. Defendant sought to suppress all of the identification testimony as being tainted by the photograph obtained during his illegal detention.

The Court held that while the photo array identification should have been suppressed, the in-court identification was properly admitted. This difference stemmed from the fact that the in-court identification was based not on the police showing the victims the photograph obtained through the illegal seizure, but rather on the victims' independent ability to recall the defendant's identity. This ability antedated the unlawful arrest.

Unlike the witness in *Crews*, the expert in this case had no independent basis, other than the illegally obtained evidence, to conclude that petitioner's fingerprints matched those found at the grocery store. Nor did the expert's opinion regarding the fingerprints antedate the illegal arrest and fingerprinting of petitioner. Unlike the in-court identification in *Crews*, the testimony of the expert in this case was a result of the police exploitation of the illegal arrest and must be suppressed. This conclusion follows from this Courts' opinion in *Davis v. Mississippi*, 394 U.S. 721, 725-26 n.4 (1969).

CONCLUSION

The judgment of the Supreme Court of Alabama should be reversed. The confession and expert fingerprint testimony clearly were tainted by the illegal arrest, and therefore should have been suppressed.

Respectfully submitted,

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IN THE

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This brief is filed pursuant to Rule 36 of the Supreme Court Rules. Consent to file has been granted by Hon. Charles A. Graddick, Attorney General, State of Alabama, Counsel for Respondent, hereinafter called "State", and Robert M. Beno, Esq., Counsel for Petitioner, hereinafter called "defendant". Letters of Consent of both parties have been filed with the Clerk of this Court. States and municipal governments are not required to obtain consent to file as *amici curiae.*

INTEREST OF AMICI

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in

establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties, and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* thirty-eight times in the Supreme Court of the United States, and twenty-eight times in other appellate courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio and Missouri.

The Chicago Crime Commission is a not-for-profit Illinois corporation that has provided, since 1919, an independent oversight of the criminal justice system in the Chicago metropolitan area. It is composed of 350 prestigious members of the business, professional and legal community, whose purpose is the improvement of the system and a better understanding of its workings by law-abiding citizens.

The Chicago Police Department, City of Chicago, is represented by its chief executive officer, commanding the second largest metropolitan police department in America. He is responsible for the effective investigation and charging of crime in one of the most populous and diverse areas of our nation.

The Crime Victim's Legal Advocacy Institute is a national, not-for-profit, public interest law center, the purposes of which are to promote and foster the legal rights of victims of crime and to utilize the legal system to prevent, where possible, future victimization.

The International Association of Chiefs of Police, Inc. (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 12,600 members in 62 nations. Through its programs of training, publications, legislative reform, and *amicus curiae* advocacy, it seeks to make

the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

The National Sheriffs' Association (NSA), a not-for-profit organization, has over 50,000 members, including sheriffs and their deputies, municipal, state and federal law enforcement officers, and other criminal justice professionals. NSA encourages and promotes the fair and efficient administration of justice through the establishment of standards, research, educational courses and publications and crime prevention programs.

The State of Arizona is represented by its Attorney General, an elected and constitutional official who is the chief legal officer of his State and charged with the responsibility of protecting the legal rights and interests of the citizens of his State.

The State of Illinois is represented by its Attorney General, an elected and constitutional official who is the chief legal officer of his State and charged with the responsibility of protecting the legal rights and interests of the citizens of his State.

Amici well know the problems faced by police officers in their good faith attempts to conduct criminal investigations and gather evidence by using investigative procedures that comport with the myriad of rules and exceptions that have been judicially engrafted upon the Fourth and Fifth Amendments. The state of this intricate maze of rules applicable to arrest, search and seizure and interrogation compels these individuals and organizations to speak on behalf of the law enforcement officers in this case and all those facing similar problems as they seek to carry out their sworn duty to protect life and property.

FACTUAL AND PROCEDURAL SETTING OF THIS CASE

The facts of this case have been thoroughly presented in the opinions of the Alabama Supreme Court and the Court of Criminal Appeals, and will not be repeated at length here.

Briefly, defendant was the subject of a warrantless arrest for a robbery committed by three men in the City of Montgom-

ery, Alabama. His arrest was made on the basis of certain statements given by a prisoner awaiting trial in an unrelated, unsolved crime. The prisoner was a suspect in the same robbery for which defendant was arrested. Defendant was arrested, finger-printed, and questioned at a police station. The fingerprints matched those found at the scene of the crime on objects held by one of the robbers. After the fingerprint comparison was made a warrant for defendant's arrest was obtained. Defendant was confronted with the fingerprint evidence and questioned. His confession came six hours after the initial arrest.

Defendant does not question the voluntariness of such confession and it has been shown to have been given in full compliance with *Miranda* v. *Arizona,* 384 U. S. 436 (1966). He contends that he was arrested without probable cause and involuntarily transported to the stationhouse where his fingerprints were taken, and he was interrogated in violation of the rule in *Dunaway* v. *New York,* 442 U. S. 200 (1979).

The Court of Criminal Appeals of Alabama reversed the defendant's conviction, *Taylor* v. *State,* 399 So. 2d 875 (1980) and the Supreme Court of Alabama reversed the Court of Criminal Appeals and remanded for reinstatement of the jury verdict, *Taylor* v. *State,* 399 So. 2d 881 (1981). In doing so, the Supreme Court of Alabama stated that in view of the history and application of the exclusionary rule as applied to the states, and its obvious failure to accomplish its stated purpose of deterring unlawful police conduct, it was unwilling to extend the rule to the facts of this case.

ARGUMENT

I.

EVIDENCE OF THE DEFENDANT'S FINGERPRINTS AND HIS CONFESSION WERE ADMISSIBLE UNDER THE FOURTH AMENDMENT AND THE RULE IN DUNAWAY v. NEW YORK.

Amici will not reiterate at length the legal arguments made by the State in this case, although we are in complete accord with such arguments and wish to associate ourselves with and express our complete support for them. We will, however, address ourselves to the important policy questions raised by the issues in this case, and to their importance to the effectiveness of law enforcement nationwide

Amici note initially, however, that the question of the admissibility of fingerprint comparison evidence was not addressed by the Court of Criminal Appeals in its opinion, *Taylor* v. *State,* 399 So. 2d 875 (1980), and was not expressly reviewed by the Supreme Court of Alabama, *Taylor* v. *State,* 399 So. 2d 881 (1981). The intermediate appellate court reversed this case on the basis of *Dunaway* v. *New York,* 442 U. S. 200 (1979), considering only the issue of admissibility of the confession. The Alabama High Court reversed the decision of the intermediate appellate court by distinguishing *Dunaway.* While it referred to the fingerprint issue, 399 So. 2d 881, 882, it thereafter discussed and ruled only on the admissibility of the confession under *Dunaway,* with an extended discussion focused upon the harshness and ineffectiveness of the exclusionary rule.

Amici agree with the State of Alabama that a serious jurisdictional question exists and that it is doubtful that this Court can consider the fingerprint issue in light of *Street* v. *New York,* 394 U. S. 576 (1969), where it was held that when a question is not presented to the state courts in such a manner that it is decided by the state's highest court when it affirms the

conviction, the Supreme Court of the United States lacks power to review the question.

Assuming, arguendo, that this Court has jurisdiction to consider the admissibility of both the fingerprint and confession evidence, it is submitted that neither should be suppressed on the basis of a finding of no probable cause. *Amici* believe that a careful review of the testimony and facts as developed in the suppression hearing, as set forth in both the intermediate appellate court opinion, 399 So. 2d 875, 876-878, and the opinion of the Supreme Court of Alabama, 399 So. 2d 881, 882, 883, will establish probable cause for the defendant's arrest. The operative facts are that the police had a description of the robber, a set of latent prints from the scene of the crime, and information specifically naming defendant. The information came from an informer who was in jail on pending charges and needed help in exchange for reliable information, and he was also a suspect in the same robbery for which the defendant was subsequently convicted. *Amici* believe that under the rule of *Aguilar* v. *Texas,* 378 U. S. 108 (1964), and *Spinelli* v. *United States,* 394 U. S. 410 (1969), and their progeny, the reliability of the informer was sufficiently established to provide probable cause for the arrest that followed. If this Court believes that the facts concerning the informer's reliability were inadequately developed at the suppression hearing, it is submitted that the case be remanded to the state court for an additional fact-finding hearing on the issue and the question of the good faith of the police officers as argued in point II, *infra.*

Even if the defendant had been arrested upon less than probable cause, we submit that *Dunaway* v. *New York,* 442 U. S. 200 (1979) does not require the rejection of his confession; any taint of the arrest had been attenuated by the time he confessed.

The following are our detailed reasons:

1. ***The interval between the arrest and confession, and the presence of intervening circumstances.***

In *Dunaway*, less than two hours elapsed between the arrest and the confession, whereas in the instant case there was a six-hour interval, during which a number of detaching events occurred. The defendant was placed in a lineup, at which the victims were unable to make an identification; his fingerprints were taken and compared with those found at the scene of the crime; the facts of the crime were presented to an independent magistrate who issued an arrest warrant on the basis of the fingerprint comparisons; the defendant was advised of his *Miranda* rights on three different occasions; and he even had a conversation with a girl friend and a male companion. All of this occurred prior to the confession.

2. *The true purpose of the police conduct with respect to the arrest.*

In *Dunaway* the defendant's arrest was purely investigatory and the officers took the position that the defendant in that case was merely "detained," whereas in the instant case the rather extensive investigation had focused on one person, Omar Taylor. He was advised immediately upon being taken into custody that he was under arrest for the robbery. The police had a description of the robber, a set of latent prints from the scene of the crime, and specific information from an informer naming defendant as a perpetrator of the crime. Even though the reliability of the informer might not have been established, the police had good reason to believe that his information was accurate. The informer was in jail awaiting trial on pending unrelated charges and needed help from the authorities in exchange for reliable information, and the informer was himself a suspect in the robbery for which the defendant was arrested. Certainly this was not a hunch or surmise similar to that which may have motivated the police in *Dunaway*, nor was it a dragnet operation similar to that in *Davis* v. *Mississippi*, 394 U. S. 721 (1969). Here there was a well considered, credible, reasonable basis for the arrest of the defendant, even if the facts did not rise to the level of probable cause. It can hardly be said

that the police here acted improperly or with any badge of flagrancy, even though, in retrospect, the sum total of the evidence might not have satisfied a technical standard of probable cause.

Two recent cases demonstrate the narrow nature of the holding in *Dunaway* and that the rule in that case does not require an automatic suppression of evidence obtained after an illegal arrest. In *People* v. *Rogers*, 421 N. E. 2d 491 (1981), the New York Court of Appeals stated: " * * * it has never been enough to show that evidence must be suppressed simply because it was discovered subsequent to an illegal arrest; it must in addition be shown that the police exploited the illegal detention in such a way as to establish that it was the detention which produced the challenged statements." 421 N. E. 2d at 494. Nothing in *Dunaway* changes this well-settled principle, the court said. It found that three inculpatory statements the defendant made during his illegal detention stemmed from the independent exercise of his free will, rather than the detention. The defendant made the first statement after being confronted with a blood-stained boot that officers discovered while pursuing a lead that had nothing to do with defendant's arrest. Having properly seized the boot, the police could ask the suspect about it. The other statements came after he talked with his brother, which was an intervening event that helped further attenuate the taint of the arrest. The police did not use the arrest to intimidate the suspect or to further their investigation.

In *State* v. *Barry*, 429 A. 2d 581 (N. J. 1981), *cert. den.*, 30 Cr L 4067 (1981), the New Jersey Supreme Court held that a defendant's otherwise voluntary confession was not tainted by his illegal arrest some 18 hours earlier. The Court distinguished this case from *Dunaway*. Although the police lacked probable cause for the arrest, there was no indication that the arrest was a pretext for obtaining a confession. Six hours after the arrest, one of the defendant's three codefendants gave a full confession

to the felony murder implicating the defendant. At that point, according to the New Jersey Supreme Court,

> the police had probable cause to hold defendant as a suspect in the murder investigation. Indeed, it was decided to bring defendant before the court to be charged with homicide along with his three co-conspirators that same day. He was then returned to Montclair Police Headquarters for that purpose. While there, and after having been given *Miranda* warnings again, he was told that his three co-conspirators had confessed and the contents of those statements were reviewed with him. He was also shown the weapons used in the robbery, as well as the deceased officer's gun, which had been recovered by the police. It was only after these events that defendant gave a full statement of his involvement in the robbery-murder.
>
> We hold that these intervening independent circumstances which preceded defendant's confession effectively purged the taint of his illegal arrest. Statements following an illegal arrest must be excluded from evidence only if they are causally related to the invasion of the suspect's rights. The instant facts do not present the close causal connection between the illegal seizure and the confession found in *Dunaway*. * * * The occurrence of other independent causative events including Murphy's confession, which directly implicated defendant, and recovery of the guns, which were shown to defendant, severed any possible chain of causation between the original illegal arrest and defendant's subsequent confession. 429 A. 2d 581, 585.

In summary, it is submitted that neither fingerprint evidence or confession should be suppressed on the basis of the rule in *Dunaway*. The Supreme Court of Alabama properly distinguished those cases from the facts of this case.

II.

ASSUMING, ARGUENDO, THAT THE DEFENDANT'S FINGERPRINTS AND CONFESSION WERE SUBJECT TO SUPPRESSION UNDER THE RULE IN DUNAWAY v. NEW YORK, SUCH EVIDENCE SHOULD NOT BE EXCLUDED, SINCE THE POLICE ACTED IN A REASONABLE GOOD FAITH BELIEF THAT THEIR CONDUCT WAS PROPER.

The basic problem in this case, as eloquently highlighted by the Supreme Court of Alabama in its opinion, 399 So. 2d 881, 883-894, is not the conduct of the police officers; it is the exclusionary rule, plain and simple. This Court is certainly able to take appropriate notice of the literal groundswell of discontent with the rule that fills the pages of court proceedings, law reviews, comments, legislative reports, newspapers and the everyday speech of our people. The problem, the cause of the problem, and a reasonable solution to the problem, is best summed up by the recent recommendation of the Attorney General's Task Force on Violent Crime:

> The fundamental and legitimate purpose of the exclusionary rule—to deter illegal police conduct and promote respect for the rule of law by preventing illegally obtained evidence from being used in a criminal trial—has been eroded by the action of the courts barring evidence of the truth, however important, if there is any investigative error, however unintended or trivial. We believe that any remedy for the violation of a constitutional right should be proportional to the magnitude of the violation. In general, evidence should not be excluded from a criminal proceeding if it has been obtained by an officer acting in the reasonable, good faith belief that it was in conformity to the Fourth Amendment to the Constitution. A showing that evidence was obtained pursuant to and within the scope of a warrant constitutes prima facie evidence of such a good faith belief. We recommend that the Attorney General instruct United States Attorneys and the Solicitor General to urge this rule in appropriate court proceedings,

> or support federal legislation establishing this rule, or both. If this rule can be established, it will restore the confidence of the public and of law enforcement officers in the integrity of criminal proceedings and the value of constitutional guarantees. Attorney General's Task Force on Violent Crime, 29 CrL 3131, 3134 (1981).

To that end, two bills which would apply to federal officers have been introduced in the United States Senate in opposition to the exclusionary rule. S. 101, introduced by Senator DeConcini, would provide for a good faith exception in the case where an officer entertained a reasonable belief that his conduct conformed to the law. In contrast, S. 751, sponsored by Senators Hatch and Thurmond, would abolish the rule, and create a statutory tort remedy against the United States in its place. This bill also provides for disciplinary action against the offending officer after notice and a hearing if it is determined that the violation was deliberate. Hearings are currently being conducted on both of these bills before the Senate Judiciary Subcommittees on Criminal Justice and Criminal Law.

Recently the State of Colorado became the first state to adopt a good faith exception to the exclusionary rule by statute (Colo. Rev. Stat. 16-3-308, signed by Governor Richard D. Lamm on June 5, 1981, and taking effect July 1, 1981). The legislation was sponsored by 33 representatives and 7 senators in the Colorado legislature, and, according to its draftsman, Denver District Attorney Dale Tooley, speedy judicial review of the new statutory exception to the exclusionary rule will be sought. Other states have followed the lead of Colorado and it is anticipated that by the end of 1982 many states will have exclusionary rule reform legislation in place.

Most scholars concede that the principal rationale relied upon by this Court in adopting the rule, first in the federal forum in *Weeks* v. *United States*, 232 U. S. 383 (1914), and then for the states in *Mapp* v. *Ohio*, 367 U. S. 643 (1961), was that suppression of evidence "illegally" seized would deter

future illicit police conduct in cases of arrest, search and seizure. This rationale, however, depends entirely upon the logical principle that *for a given individual to be deterred from doing something, he must know, at least within reasonable limits, just what it is that he is supposed to be deterred from doing.*

This is the very "linch-pin" of the deterrence argument in support of the rule. The question is not *whether* suppression of evidence deters unlawful police conduct, but, rather, given the complex, conflicting, and confusing state of the law of arrest, search and seizure today, whether the threat of suppression has the potential to deter such conduct. Based upon past experience with the exclusionary rule, the potential is lacking.

To "deter" means to discourage or restrain someone from acting or proceeding out of fear of the consequences of doing so; however, built into this definition is the concept that the actor must have some certainty, within reasonable limits, as to what conduct is permitted. Otherwise the concept of deterrence must fail because the actor simply can not fear the consequences of doing an act unless he knows, or should know, or believes, that the act is wrong. Applying this principle to modern police procedure, the officer, to be deterred, must know or believe with some reasonable certainty that his action in making a given arrest, search and seizure is "illegal" under the law. *Amici* submit that the law of arrest, search and seizure is so complex today that officers, who are not lawyers engaged in the volatile business of enforcing the criminal law, have no reasonable certainty whatever as to the legal parameters which circumscribe much of their conduct when making arrests and searches.

In order to demonstrate the contention that the law in this area has become such a morass we need look no further than the decisions of this Court. *Amici* respectfully observe that the

Justices of this Court frequently do not agree among themselves in Fourth and Fifth Amendment cases.

To illustrate, consider the *syllabi*, that is the official listing of how each Justice voted, in two relatively recent search and seizure cases from the Court.

In *Coolidge* v. *New Hampshire*, 403 U. S. 443 (1971), the Court reversed a murder conviction based upon a finding of an illegal search and seizure. The syllabus reads:

> Mr. Justice Harlan concurred in parts of the opinion and in the judgment and filed an opinion. Mr. Justice Black concurred in part and dissented in part in which Mr. Justice Blackmun joined in Parts II and III and in portion of Part I. Mr. Justice White concurred in part and dissented in part in which Mr. Chief Justice Burger joined. Mr. Chief Justice Burger dissented in part and concurred in part and filed opinion.

More recently, in *United States* v. *Mendenhall*, 446 U. S. 554 (1980), where the Court affirmed the conviction of a drug suspect, the syllabus reads:

> Stewart, J., announced the court's judgment and delivered an opinion of the Court with respect to Parts I, II-B, II-C, and III, in which Burger, C. J., and Blackmun, Powell, and Rehnquist, J., joined. Powell, J. filed an opinion concurring in part and concurring in the judgment, in which Burger, C. J., and Blackmun, J., joined. White, J., filed a dissenting opinion, in which Brennan, Marshall, and Stevens, J., joined.

In two very important cases from the last Term of the Supreme Court the pattern was repeated with agonizing results for the police. In *New York* v. *Belton*, ____ U. S. ____ (1981) the police were told that they *could* search the passenger compartment of a vehicle without a warrant, including the contents of closed containers, where the occupants were arrested on probable cause. The syllabus reads:

> Stewart, J., delivered the opinion of the Court, in which Burger, C. J., and Blackmun, Powell, and Rehnquist, JJ.

> joined. Rehnquist, J., filed a concurring statement. Stevens, J., filed an opinion concurring in the judgment. Brennan, J., filed a dissenting opinion, in which Marshall, J., joined. White, J., filed a dissenting opinion, in which Marshall, J., joined.

The very same day (July 1, 1981), the police were told in *Robbins* v. *California*, ____ U. S. ____ (1981) that they could *not* search closed containers found in the trunk of an automobile, even though they had probable cause for arrest of the driver and the search of the trunk. In *Robbins*, however, the police were put in the confusing position of not even being able to read a 5-4 or 6-3 majority opinion, as the Court could muster only four votes for a *plurality* opinion.

Amici have pondered how they should instruct their law enforcement constituency on the significance of the plurality opinion in *Robbins*. The syllabus reads:

> Stewart, J., announced the judgment of the Court and delivered an opinion, in which Brennan, White, and Marshall, JJ., joined. Burger, C. J., concurred in the judgment. Powell, J., filed an opinion concurring in the judgment. Blackmun, Rehnquist, and Stevens, JJ., filed dissenting opinions.

We respectfully submit that when this Court is so diverse in its manifold opinions in the law of arrest, search and seizure, that we not only have 5-to-4 and 6-to-3 splits as to the *actual holding* in a given case, but even further differences over *parts* and *sub-parts* in a given opinion, such opinions can have little instructive effect upon the police. Furthermore, there are plurality opinions from which not even a majority view can be gleaned by the police. In consequence, the concept of deterrence is seriously threatened.

It appears that there is little unanimity as to what does or does not constitute proper police conduct in these cases. To this we must add the enormously complicating factor that although on basic constitutional issues, the Supreme Court establishes the

controlling interpretation, this interpretation is then subject to the subsidiary interpretation of hundreds of appellate courts and thousands of trial courts across the country. The combinations and permutations of this interpretive process are staggering.

All of these complex, conflicting and confusing interpretations are expected to be digested and rigidly adhered to by the police officer, upon pain of suppression if he fails to do so. Moreover, the officer is supposed to make his interpretation on the street, often in a matter of minutes or even seconds, and often under the acknowledged dangers and stresses of police work, and with the knowledge that the community he serves *expects him to act to protect it.* The officer is expected to be "discouraged or restrained" from doing "illegal" acts in the performance of his duty, but, given the complexities outlined above, he cannot possibly know what he is or is not supposed to do in many cases; hence, the entire concept of deterrence fails. This Court itself recognized this when it stated:

> If the purpose of the exclusionary rule is to deter unlawful police conduct then evidence obtained from a search should be suppressed only if it can be said that the officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment. *United States* v. *Peltier,* 422 U. S. 531 (1975) at 542.

As a way out of this morass, the state and federal courts have begun to construct their own remedies. Most recently the concept that a police officer's objective good-faith belief that his conduct was proper has been held to bar the application of the exclusionary rule to the evidence.

In *United States* v. *Williams,* 622 F. 2d 830 (5th Cir. 1980), *cert. den.,* 101 S. Ct. 946 (1981), the Fifth Circuit Court of Appeals, sitting *en banc,* stated:

> Henceforth in this circuit, when evidence is sought to be excluded because of police conduct leading to its discovery,

> it will be open to the proponent of the evidence to urge that the conduct in question, if mistaken or unauthorized, was yet taken in a reasonable, good-faith belief that it was proper. If the court so finds, it shall not apply the Exclusionary Rule to the evidence. 622 F. 2d 830, 846-7 (5th Cir. 1980)

This exception to the exclusionary rule is strictly limited. The *Williams* Court noted that the officer's subjective belief concerning the legality of a search is not enough. Ignorance of the basic principles of criminal procedure would obviously not constitute good faith. The police officer's actions are subject to an objective test and must be "based upon articulable premises sufficient to cause a reasonable, and reasonably trained, officer to believe he was acting lawfully." 622 F. 2d 830, 847.

The *Williams* Court noted: "It makes no sense to speak of deterring police officers who acted in the good-faith belief that their conduct was legal by suppressing evidence derived from such actions unless we somehow wish to deter them from acting at all." 622 F. 2d 830, 842. The court further articulated the need to apply the rule only when that application can serve its originally intended purpose, deterrence. 622 F. 2d 830, 847.

As noted in *Peltier, supra,* this Court itself has recognized that the deterrent effect of police misconduct intended by the rule is significantly diminished when officers act under a valid good-faith belief that their actions are proper. In *Michigan* v. *Tucker,* 417 U. S. 433, 447 (1974), the Court stated:

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least, negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a great degree of care toward the rights of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.

In a concurring opinion in *Brown* v. *Illinois*, 422 U. S. 590, 612 (1975), Mr. Justice Powell made the following observation on *Michigan* v. *Tucker:* "In cases in which this underlying premise is lacking, the deterrence rationale of the exclusionary rule does not obtain, and I can see no legitimate justification for depriving the prosecution of reliable and probative evidence."

Since the opinion of the Fifth Circuit Court of Appeals in *Williams*, other federal and state courts are rapidly beginning to look beyond alleged police misconduct to determine whether such misconduct was flagrant and purposeful, in which case the rule would apply as it was intended, or whether the misconduct was carried out under a genuine objective good-faith belief that the officer's conduct was consistent with lawful enforcement procedures, in which case the evidence would properly be admitted to assist in the determination of the guilt or innocence of the accused. *People* v. *Pierce*, 88 Ill. App. 3d 1095, 411 N. E. 2d 295, 301 (1980), is one such case. There the court stated, "... the purpose and flagrancy of the police misconduct is premier in any analysis, ..." The court then considered the totality of circumstances, found that the police intrusion was minimal and not conscious or flagrant, and held that the "reasonable and good-faith belief" exception to the exclusionary rule fashioned by the *Williams* court would apply.

In *People* v. *Adams*, 53 N. Y. 2d 1, 422 N. E. 2d 537, 29 Cr L 2173 (1981), the New York Court of Appeals applied the good-faith exception to a consent to search situation where the consenting party was not a lawful resident of the premises searched by the police. On the applicability of the rule to this specific situation, the Court of Appeals at 29 Cr L 2173 stated:

> A further, although somewhat related, consideration behind this line of reasoning involves the very purpose of the exclusionary rule ... Because the exclusionary rule is primarily aimed at deterring police misconduct, these courts have recognized that its purpose would not be furthered by applying it in instances where the police,

> believing that they are acting lawfully, engage in a search which later turns out to be "unlawful" because, in hindsight, their reasonable reliance on the consenting person's authority proves to be erroneous.

In *Richmond* v. *Commonwealth*, ____ S. W. 2d ____ (Ky. App. 1981), Kentucky effectively joined the list of jurisdictions adopting a good faith exception to the exclusionary rule. Its Court of Appeals refused to suppress drugs whose seizure, while perhaps technically illegal, was accomplished by police officers acting reasonably and in complete good faith. The evidence in *Richmond* was seized pursuant to a warrant issued by a magistrate from another jurisdiction. The Kentucky court stated: "We simply hold here, limited to the facts of this case, that the application of the exclusionary rule, even if the search warrant was illegal, would do nothing to deter future police conduct taken in the reasonable and good faith belief that the conduct was legal." I *Case Commentaries and Briefs*, No. 6, pp. 9-10 (National District Attorneys Association: December, 1981). *See also, Commonwealth* v. *Bradshaw*, ____ A. 2d ____ (Pa. Super. 1981).

In *State* v. *Lehnen*, 403 So. 2d 683 (La. 1981), the Supreme Court of Louisiana held that a reviewing court evaluating a search warrant affidavit from which it was claimed material facts were omitted could use the same approach it would in dealing with a claim that certain facts included were false. In adopting this rule the court looked with favor upon the growing "good faith" exception to the exclusionary rule. It stated at 403 So. 2d 686:

> The exclusion of reliable evidence is too high a price to pay unless exclusion is essential to deter deliberate violations of constitutional rights. Further, this approach is in accordance with the growing recognition that the exclusionary rule has limited efficacy as a deterrent in situations in which officers have acted in good faith. See *United States* v. *Williams*, 622 F. 2d 830, 27 Cr. L. 3293 (5th Cir. 1980) * * *.

In *Gray* v. *State*, ____ A. 2d ____ (Del. 1981), the Supreme Court of Delaware held that in view of the apparent good faith on the part of police officers, and the limited nature of the search made strictly in accordance with the scope of a consent to search, a 20 hour delay between the consent and a search was reasonable.

Last year the Court of Appeals for the Sixth Circuit held in *United States* v. *Bailey*, 628 F. 2d 938 (1980) that the police must usually obtain a warrant before installing a beeper and that the warrant must set a time limit on the beeper's use. However, in view of the deterrence rationale underlying the exclusionary rule, the U. S. District Court in Michigan for the Eastern District recently held in *United States* v. *Cassity*, ____ F. Supp. ____ (1981), that police acting before the decision in *Bailey* could have reasonably believed that such a strict warrant requirement was inapplicable to beeper installations. Therefore, since the officers in *Cassity* acted in "good faith" by actually securing a warrant, the District Court refused to suppress the fruit of their surveillance just because the warrant lacked the necessary termination date. The court stated:

> In this case, application of the exclusionary rule will not deter the agents who acted in good faith since *Bailey* serves that purpose, nor will it remedy the harm that has accrued to the victim of the search. * * * Neither is the integrity of this court questioned because it is not applied. The rule is fashioned by the court but its application is not mandatory where no useful purpose is served. Therefore, I decline to apply the exclusionary rule and deny defendants' motion to suppress the evidence seized as a result of the beeper monitoring. I *Case Commentaries and Briefs*, No. 7, p. 7 (National District Attorneys Association: January, 1982).

In each of the foregoing cases the officers had made arrests or searches under circumstances which, strictly speaking, violated the defendants' Fourth Amendment rights, but which were made in good faith. In all of them the court refused to suppress the evidence on the theory that since the police

reasonably, albeit erroneously, believed that their conduct was proper, it would serve no deterrent purpose to exclude the evidence.

Amici submit that the rationale of these decisions underscores the "logical impossibility of deterrence." Each Fourth Amendment application was made under circumstances in which the complexity of the law was such that the officers had reason to believe that they were acting properly even though, in hindsight, it could be found that they were not. The important point is that the courts found that they *were not deterred* because they believed, in objective good faith, that their actions were correct. Thus it would appear that the complexity of the law argument and the good faith exception are "opposite sides of the same coin," and we submit that one should reinforce the other.

Even though the officers in *Taylor* may have had some instruction regarding the legal restrictions upon arrest powers, they nevertheless assumed, in good faith, that under the facts of this case, with information coming from another suspect in the same case, and fingerprints available for comparison with Taylor's prints, there was the required basis for arresting Taylor. Another evidence of good faith is the fact that an arrest warrant was procured prior to the time Taylor confessed.

CONCLUSION

Amici join with the Supreme Court of Alabama in the view that "given the history of the development and application of the exclusionary rule as applied to the states, and its obvious failure to accomplish its stated purpose of deterring unlawful police conduct, * * *", the exclusionary rule should not be applied in this case. This case presents a timely and appropriate opportunity for the Court to adopt the good faith exception to the exclusionary rule. 399 So. 2d 881, 893.

While the police officers, from every indication in the record, acted in an objective good faith belief that their conduct comported with the Fourth Amendment, if the Court believes that the record needs to be enlarged on this point, we urge that it remand the case to the state court for a fact-finding hearing on the question of whether the police conduct was taken in the good faith belief that it was legal.

Amici respectfully submit that the decision of the Supreme Court of Alabama should be affirmed on the facts and law, and on the basis of sound judicial policy.

Respectfully submitted,

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